FILED.
OCT 8 1912
JAMES H. McKENN

Nos. 621, 622.

In the Supreme Court of the United States.

OCTOBER TERM, A. D. 1912.

THE UNITED STATES OF AMERICA, UPON THE APPLICATION OF THE ATTORNEY GENERAL, AT THE REQUEST OF THE INTERSTATE COMMERCE COMMISSION, APPELLANT,

v.

THE UNION STOCK YARD AND TRANSIT COMPANY OF CHICAGO, A CORPORATION; THE CHICAGO JUNCTION RAILWAY COMPANY, A CORPORATION; THE CHICAGO JUNCTION RAILWAYS AND UNION STOCK YARDS COMPANY, A CORPORATION; DAVID PFAELZER, ABE PFAELZER, AND JONES L. PFAELZER, A COPARTNERSHIP DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF LOUIS PFAELZER SONS, APPELLEES.

CHICAGO JUNCTION RAILWAY COMPANY, APPELLANT,

v.

UNITED STATES OF AMERICA, APPELLEE.

BRIEF FOR THE UNITED STATES.

WASHINGTON: GOVERNMENT PRINTING OFFICE: 1912

INDEX.

	Page.
STATEMENT OF THE CASE	1–17
Parties to the appeals	1, 2
Bill is to enjoin violations of sections 2, 3, and 6, act to regulate commerce, and section 1, Elkins Act	2, 3
Opinions of Commerce Court	3, 4
NARRATIVE OF FACTS	4, 7
Stock Yard Company incorporated February 13, 1865	4
Description of Stock Yard Company and its railroad and method of operation, showing that it and Junction Company engaged in interstate commerce	4, 5
Agreement of 1897 by which Stock Yard Company turned over to predecessors of Junction Company operation of its tracks	5
Investment Company organized 1890	6
Pfaelzer & Sons, packers on Stock Yard line	6
Agreement of Stock Yard Company to pay $50,000 to Pfaelzers	6
Prayer of bill is to restrain Stock Yard Company and Junction Company from engaging in interstate commerce until they file tariffs with the commission and to restrain the performance of the Pfaelzer contract	7
DETAILED STATEMENT OF FACTS	7–17
ORGANIZATION OF THE STOCK YARD COMPANY	7–13
Sections 1, 3, 4 and 11 of its charter	7–9
Tracks	9
Equipment and employees	9, 10
The Stock Yard	10
Union Freight Station	10
Method of operation	10
Dead freight	10
Carload lots	10
Less than carload lots	11
Live stock	11
Arriving at Chicago	11
Originating at Chicago	11, 12
Through freight	12, 13
Horses	13
Weighing	13
Bills of lading	13
Tariffs	14

DETAILED STATEMENT OF FACTS—Continued. Page.
Freight charges 15
Demurrage 16
TRANSFER TO THE JUNCTION COMPANY 16, 17
SPECIFICATION OF ERRORS 17, 18
POINTS AND AUTHORITIES 18–22
ARGUMENT 25–40
I. THE STOCK YARD COMPANY AND THE JUNCTION COMPANY ARE COMMON CARRIERS ENGAGED IN THE TRANSPORTATION OF PROPERTY WHOLLY BY RAILROAD FROM ONE STATE TO ANOTHER 25–35
(1) Both companies are engaged in the transportation of property wholly by railroad from one State to another 23
(*a*) Property is in interstate commerce from delivery to carrier for shipment into another State until there delivered to consignee ... 23, 24
Coe *v.* Erroll, 116 U. S., 517 23
The Daniel Ball, 10 Wall., 557 23
Henderson *v.* N. Y., 92 U. S., 271 24
Wabash R. Co. *v.* Ill., 118 U. S., 557 24
Rhodes *v.* Iowa, 170 U. S., 412 24
Heyman *v.* Southern Ry. Co., 203 U. S., 270 24
(*b*) Commerce act defines "railroad" and "transportation" to include every instrument used and every step taken in such interstate commerce 25
Sec. 1, Hepburn Act 25
(*c*) Both companies are engaged in transportation 25
Their activities are within both judicial and legislative definitions 25, 26
Immaterial if distance be short or cars only be hauled 27
Kentucky, etc., Bridge Co. *v.* Louisville & N. R. R. Co., 37 Fed., 615 27
M. P. Ry. *v.* Gwinn Co., 55 Kans., 525. 27
P. & P. U. Ry. Co. *v.* C., R. I. & P. Ry. Co., 109 Ill., 135 27
U. S. & C. & N. W. Ry. Co., 157 Fed., 619 27
Cars are the subject of carriage 27
Towboat may be engaged in interstate commerce 27
Moran *v.* New Orleans, 112 U. S., 69 ... 27

ARGUMENT—Continued. Page.

I. The Stock Yard Company and the Junction Company, etc.—Continued.
(1) Both companies are engaged in the transportation of property, etc.—Continued.
(*d*) Such transportation is wholly by railroad and from one State to another..... 28
I. C. C. *v.* C. N. O. & T. P. Ry. Co., 162 U. S., 184..... 28
Southern Pac. Terminal Co. *v.* I. C. C., 219 U. S., 498..... 19
U. S. *v.* Colo. & N. W. R. Co., 157 Fed., 321..... 19
Leonard *v.* Kansas City, etc., Ry. Co., 13 I. C. C., 573..... 19
Standard Oil Co. *v.* U. S., 179 Fed., 614. 19
Denver & R. G. R. Co. *v.* I. C. C., 195 Fed., 968..... 19
I. C. C. *v.* Bellaire, Z. & C. R., 77 Fed., 942..... 28
U. S. *v.* Chicago, etc., R. Co., 81 Fed., 783..... 28
N. Y., N. H. & H. R. R. *v.* I. C. C., 200 U. S., 361, 391..... 29, 43, 44
Norfolk & Western R. R. Co. *v.* Pa., 136 U. S., 114..... 29
U. S. *v.* Hartwell, 6 Wall., 396..... 396
Am. Security & Trust Co. *v.* D. C., 224 U. S., 491..... 29
So. Pac. Terminal Co. *v.* I. C. C., 219 U. S., 498, 525..... 30
U. S. *v.* Colo. & N. W. R. Co., 157 Fed., 321, 329..... 31
Standard Oil Co. *v.* U. S., 179 Fed., 614, 620..... 31
(2) Both Stock Yard Company and Junction Company are common carriers..... 32
(*a*) Definition of common carriers..... 32
Niagara *v.* Cordes, 21 How., 7, 22..... 32
Redfield on Carriers, Ed. of 1869, 1..... 32
Dwight *v.* Brewster, 1 Pick., 50..... 32
Wiggins Ferry Co. *v.* R. R. Co., 107 Ill., 450, 457..... 32–33
Gordon *v.* Hutchinson, 1 W. & S., 285... 32
Carriers of live stock are common carriers.... 32
Myrick *v.* Mich. Cent. R. Co., 107 U. S., 106..... 32
5 Am. & Eng. Enc. Law, 2d Ed., 428.... 32

ARGUMENT—Continued. Page.

I. The Stock Yard Company and the Junction Company, etc.—Continued.
(2) Both Stock Yard Company and Junction Company are common carriers—Continued.
(*b*) Under charters and by reason of activities, both corporations come within these definitions 33
Each organized as railroad company and can not deny charters 33, 34
Randolph *v.* Post, 93 U. S., 502 34
Improvement Co. *v.* Slack, 100 U. S., 648 34
Union Trust Co. *v.* Randall, 20 Kans., 515 34
Under Illinois Constitution are common carriers 34
Junction Company conceded to be common carrier 34, 35
Properties of both companies are railroads and they are engaged in transportation within definition of Hepburn Act 35
Hold themselves out to general public to perform these services for hire 35
Union Stock Yards Co. *v.* U. S., 169 Fed., 406 35
(3) Courts have held stock yards to be common carriers engaged in interstate commerce 35
U. S. *v.* Union Stock Yards, 161 Fed., 919; affirmed 169 Fed., 404 36
U. S. *v.* Sioux City Stock Yards, 162 Fed., 556 36
Belt Ry. Co. *v.* U. S., 168 Fed., 542 36
U. S. *v.* Ill. Terminal Ry. Co., 168 Fed., 546 36
McNamara *v.* Wash. Terminal Co., 37 App. Cas., D. C., 384 36
Covington Stock Yard Co. *v.* Keith, 139 U. S., 128 36
Walker *v.* Keenan, 73 Fed., 755 36
Stock Yard Company and Junction Company are in reality partners and but one system 37–38
Meehan *v.* Valentine, 145 U. S., 623 38
Southern Pac. Terminal Co. *v.* I. C. C., 219 U. S., 498 39
Northern Securities Co. *v.* U. S., 193 U. S. 197 40
U. S. *v.* Milwaukee Refrig. Transit Co., 142 Fed., 247; (S. C.) 145 Fed., 1007 .. 40, 43
Kendall *v.* Klapperthal, 52 Atl., 92 40
Swift & Co. *v.* U. S., 196 U. S., 375 40

ARGUMENT—Continued. Page.

II. THE PAYMENT UNDER THE PFAELZER CONTRACT WOULD CONSTITUTE A REBATE, CONCESSION, AND UNLAWFUL DISCRIMINATION..... 40–49

American Express Co. *v.* U. S., 212 U. S., 532..... 43

Act to regulate commerce, secs. 2, 3; Elkins Act, sec. 1..... 40–41

I. C. C. *v.* Reichmann, 145 Fed., 235... 43

Thomas *v.* U. S., 156 Fed., 897..... 43

C. & A. Ry. Co. *v.* U. S., 156 Fed., 558. 43

U. S. *v.* D. L. & W. R. Co., 152 Fed., 269. 43

A., T. & S. F. Ry. Co. *v.* U. S., 170 Fed., 250..... 43

Wight *v.* U. S., 167 U. S., 512..... 43

N. Y., N. H. & H. R. R. Co. *v.* I. C. C., 200 U. S., 398..... 43

Armour Packing Co. *v.* U. S., 209 U. S., 71..... 43

Such payment would amount to return to Pfaelzers of part or all of moneys paid out by them as freight..... 44–49

III. SUCH PAYMENT WOULD BE UNLAWFUL ON PART OF STOCK YARD COMPANY AND INVESTMENT COMPANY, AND RECEIPT THEREOF WOULD BE UNLAWFUL ON PART OF PFAELZERS..... 49–51

It is unlawful on part of Stock Yard Company..... 49

It is unlawful on part of Investment Company..... 50

Brandt Suretyship & Guaranty (3d ed.), sec. 20..... 50

McCanna *v.* Citizens Trust Co., 76 Fed., 420–422..... 50

Investment Company and Stock Yard Company, as well as Junction Company, one in eyes of law..... 50

So. Pac. Co. *v.* I. C. C., 219 U. S., 498.. 51

IV. THE COMMERCE COURT HAD JURISDICTION OF BILL..... 52, 53

Secs. 2 and 3, Elkins law..... 52

V. THE DECREE IN APPEAL 621 SHOULD BE REVERSED AND THAT IN APPEAL 622 AFFIRMED..... 53

In the Supreme Court of the United States.

OCTOBER TERM, A. D. 1912.

THE UNITED STATES OF AMERICA, UPON the application of the Attorney General, at the request of the Interstate Commerce Commission, appellant,

v.

THE UNION STOCK YARD AND TRANSIT Company of Chicago, a corporation; The Chicago Junction Railway Company, a corporation; The Chicago Junction Railways and Union Stock Yards Company, a corporation; David Pfaelzer, Abe Pfaelzer, and Jones L. Pfaelzer, a copartnership doing business under the firm name and style of Louis Pfaelzer & Sons, appellees. } No. 621.

CHICAGO JUNCTION RAILWAY COMPANY, appellant,

v.

UNITED STATES OF AMERICA, APPELLEE. } No. 622.

STATEMENT.

In case No. 621 the United States, complainant or petitioner in the Commerce Court, appeals from the decree of that court dismissing its bill against the

Union Stock Yard and Transit Company of Chicago, a corporation; the Chicago Junction Railways and Union Stock Yards Company, a corporation; and David Pfaelzer, Abe Pfaelzer, and Jones L. Pfaelzer, a copartnership doing business under the name of Louis Pfaelzer & Sons, subsequently incorporated under the same name.

The Chicago Junction Railway Company was a party defendant to the bill, and the relief prayed against it was granted, from which decree that company has appealed in case 622. The two cases are therefore cross appeals from the same decree of the Commerce Court.

The argument for the United States in both cases will be presented in one brief, and in order to avoid confusion the defendants to the bill will be so called here. Throughout the pleadings the Union Stock Yard and Transit Company of Chicago was called the Stock Yard Company; the Chicago Junction Railway Company was called the Junction Company, and the Chicago Junction Railways and Union Stock Yards Company was called the Investment Company, and these short names will be hereafter used.

The bill sought to enjoin violations of sections 2, 3, and 6 of the interstate commerce act (36 Stat., 544) and of section 1 of the Elkins law (34 Stat., 587).

It averred that the Stock Yard Company and the Junction Company were common carriers engaged in interstate commerce, but that they had neglected to file with the commission their tariffs as required by section 6 of the commerce act; that the Stock

Yard Company had entered into a contract with the Pfaelzers (which contract was guaranteed by the Investment Company) to pay to the Pfaelzers $50,000 on condition that they erect a packing plant of a certain capacity adjacent to the Stock Yards and to operate the same for fifteen years and to cause all cattle slaughtered by them to move through the stock yards; and that such payment would constitute a rebate concession and unjust discrimination within the meaning of both the commerce law and the Elkins act. The bill then prayed for an injunction to restrain the Stock Yard Company and the Junction Company from further engaging in such commerce until they filed tariffs, as required by section 6 of the commerce act, and also to restrain the performance of the contract with the Pfaelzers. The case was heard upon the bill and the answers of the defendants.

The Commerce Court held that the Junction Company was a common carrier subject to the interstate commerce acts and ordered it to file tariffs of its charges as required by said section 6. (R., 120.)

The court further held that the Stock Yard Company was not a common carrier, and that therefore it had no jurisdiction to determine whether the payment as contracted for would be a rebate, and the bill was therefore dismissed as to all the defendants except the Junction Company. (R., 121.)

Judge Archbald dissented in part, being of opinion that the bill should have been dismissed *in toto*. (Rec., 99–111.)

61665—12—2

The Stock Yard Company was incorporated by special act of the Illinois Legislature of February 13, 1865, and was endowed with the usual prerogatives of a stock-yards company and with the right to build and operate a railroad. (Rec., 22–27.)

The Stock Yard Company thereupon acquired some 800 acres of land in Chicago, on which it established its yard and built a hotel and railroad. Nearly 300 miles of track were built, connecting all the roads entering Chicago (and which will be hereafter called the trunk lines) with the stock yard, where a stock market was maintained (Rec., 7–8). The tracks were used as a connecting link between the eastern and western lines, over which through interstate traffic was hauled by the Stock Yard Company. Upon the tracks have been established some 650 industries, and all kinds of freight were hauled by the Stock Yard Company direct to and from these industries (Rec., 8). By far the greater part of the freight arriving at the stock yards came by continuous shipment from States other than Illinois, and the greater part of that originating at Chicago moved in continuous shipment to other States. That company also maintained a freight depot called Union Freight Station (Rec., 10). Here all dead freight in less than carload lots was received for distribution and delivery to the consignees in the case of incoming freight, and for shipment in the case of outgoing freight.

In carrying out these activities, the Stock Yard Company owned its own locomotives and other rolling

stock, and employed its own engineers and train crews and train despatchers. (Rec., 23–61.)

For handling live freight, the Stock Yard Company had the usual loading and unloading chutes, platforms, pens, etc. In the case of cattle, the trunk line hauled the loaded cars to the proper chute, where the loading and unloading was done by the Stock Yards Company. Outgoing live stock were received, loaded, and hauled by the Stock Yard Company to the trunk line. (Rec., 12–61.)

Regular charges were made by the Stock Yard Company for its multitudinous services, some of which were set forth in the tariffs filed by the trunk lines, but those tariffs were not joined in by the Stock Yard Company nor did that company file any tariffs of its own with the commission. (Rec. 14–23, 62.)

By agreement of December 15, 1897, the Stock Yard Company turned over all its rolling stock and the operation of its tracks to the predecessors in interest of the Junction Company, which agreed to pay under the designation of rental two-thirds of the net profits derived from the operation of those tracks and all other tracks then owned or thereafter acquired (R., 32, 35).

The only effect of the agreement was to divide the activities of the Stock Yard Company between it and the Junction Company, the latter company doing all the actual hauling, while the former continued to receive and load and to unload and deliver all live stock and to transfer the same in transit on through shipments.

The Investment Company was organized in 1890 under the laws of New Jersey for the express purpose of acquiring and holding the shares of the Stock Yard Company. It immediately acquired over 90 per cent of such stock, as well as all the stock of the Junction Company, except a few shares necessary to qualify directors. (R., 80.)

Pfaelzer & Sons are packers and shippers, whose establishment was on the railroad of the Stock Yard Company. Their live stock is either purchased at or delivered through the Stock Yard; this freight is practically all interstate. The Pfaelzers during the last five years have paid at least $2,800 annually in charges on such freight (R., 96).

The Pfaelzer plant was condemned by the Department of Agriculture, and the owners were under the necessity of rebuilding. They considered the advisability of removing to Kansas City, and in their answer aver that they could have gotten a large bonus from the Kansas City, Missouri, Stock Yards. Thereupon the Stock Yard entered into a contract to pay them $50,000 provided they would erect a packing plant on the line of the Stock Yard Company and maintain and operate the same for a period of 15 years and buy and use in their slaughtering business only such live stock as had moved into the Stock Yards, and if not so bought to pay the regular charges thereon as if the same had moved into the Stock Yards and had there been purchased by them; which contract was guaranteed by the Investment Company. (Rec., 37–41.)

Upon these facts the prayer of the bill is that the Stock Yard Company and the Junction Company be adjudged to be common carriers engaged in interstate commerce and that they be restrained from further engaging in such commerce until they file tariffs with the commission in accordance with section 6 of the commerce act; and that the Stock Yard Company and the Investment Company be restrained from paying and the Pfaelzers be restrained from receiving any money under said contract.

Inasmuch as the first question in the case is whether the Stock Yard Company and the Junction Company are common carriers engaged in interstate commerce, a more detailed statement of their history and activities is proper.

It is more intelligible to state the functions and activities of the Stock Yard Company and Junction Company together; and in fact the contention of the United States is that notwithstanding the operating agreement of December, 1897, the two corporations are in fact but one system, as above set forth.

ORGANIZATION OF THE STOCK YARD COMPANY.

Under the act of 1865, the Stock Yard Company is given the right to locate near the southerly limits of Chicago "all necessary yards, enclosures, buildings, structures, railway lines, tracks, switches and turnouts, aqueducts, for the reception, safekeeping, feeding, and watering, and for the weighing, delivery, and transfer of cattle and live stock of every description." (R., 23.)

By section 3 of the act the Stock Yard Company was authorized to construct a railway so as to connect its yard with the tracks of all railroads terminating in Chicago, with authority to change and reconstruct its road, and it was provided that the company—

> shall have the power and authority to * * * transport and allow to be transported thereon between said railroads and cattle yards, all cattle and live stock and persons accompanying the same to and from said yards, and may also transport and allow to be transported between the railroads entering said city, and so connected by the road or roads hereby authorized, by steam or other power, freight and property of every kind as well as stock and cattle, and may fix and establish, take and receive, such rates of toll for all freight and property so transported between said several railroads as the directors shall, from time to time, establish:
>
> Provided, all fees and charges for freights, hotel bills, feeding, carrying, and everything done by reason of the powers herein given, shall be subject to any general law that may be passed by the legislature of this State, in reference to stock yards or railroads (R., 23, 24).

By section 4, the corporation was authorized, for the purpose of obtaining lands necessary for its railroad tracks, to acquire the same by condemnation, under the provisions of the act of June 22, 1852 (R., 24, 25). This act, which is found in the General Laws of Illinois of the 17th General Assembly, 1851,

1852, authorizes public roads, railroads, plank roads, turnpike roads, canals or other public works to condemn land for their right of way.

Section 11 provided that nothing in the act should be construed as conferring upon the company the power to maintain a railroad for the conveyance of passengers or freight *in the city of Chicago* (R., 26).

The Stock Yard Company constructed and established its stock yards, which cover about 550 acres of land, and used for other corporate purposes about 250 acres in the same vicinity. Some of this land was acquired by purchase and some by condemnation (R., 3, 4). A hotel was also erected as authorized by the charter, and has since been continuously operated (R., 4).

Tracks.—The Stock Yard Company built and owns about 300 miles of track. The main tracks run from a point on the lake front near the intersection of 39th Street and the tracks of the Illinois Central Railroad Company to another point in Illinois about 8¼ miles distant; there are about 40 miles of main tracks and about 250 miles of other tracks leading to industries adjacent to the Stock Yard. Of this about 650 are connected with the Stock Yard track (R., 7, 8, and 57). While these tracks still belong to the Stock Yard Company, since 1897 they have been operated by the Junction Company.

Equipment and employees.—The equipment consists of engines and other rolling stock which are owned by the Stock Yard and operated by the Junction Company. The engineers, brakemen, flagmen, and

train dispatchers are now employed by the Junction Company. (Rec., 4.)

The Stock Yard.—This is situated several miles west of the lake. It covers a large space of ground and in it are built the pens for the reception and keeping of cattle, and the chutes and platforms for loading and unloading. The employees of the Stock Yard Company load and unload all live cattle. (Rec., 5.)

Union Freight Station.—This is near the Stock Yard and is operated for the receipt, distribution, and delivery of dead freight in less than carload lots. It is owned by the Stock Yard Company, but now operated by the Junction Company. (Rec., 10.)

METHOD OF OPERATION.

DEAD FREIGHT. *In carload lots.*—Such freight is delivered by the trunkline to the receiving track of the Stock Yard Company and marked by the former with a transfer card and then hauled by the Junction Company, in the case of through freight, to the connecting line, or in the case of a shipment to one of the industries on the Stock Yard Company tracks direct to that establishment as may be shown by such transfer card. Outgoing freight is handled in the same manner, the shipper notifying the trunk line which is to handle his freight, and that carrier delivering the empty car to the Junction Company, which hauls it to the shipper, and, after loading, hauls it back to the trunk line (R., 8, 9).

In less than carload lots.—For handling such freight the Union Freight Station was established. Outgoing freight is either delivered by the shipper to the Union Station or is hauled by the Junction Company from the shipper to the freight station, where it is assorted and transferred in transit to the cars of the proper trunk lines, and such cars are then hauled to those lines. (R., 10.)

By agreement with the Baltimore & Ohio Railroad, the Junction Company also hauls all B. & O. cars containing freight consigned to the West in less than carload lots, to its Union Station and transfers that freight to other cars, which it hauls to the western line (R., 11).

LIVE STOCK.—Cars of live stock originating at points beyond the State of Illinois are brought to the Stock Yards by the trunk-line carriers and placed at the unloading docks, chutes, or platforms where they are unloaded by the employees of the Stock Yard and delivered by it to the consignees named in the through bills of lading covering the transportation from point of origin to delivery to the consignee (bill, Rec., 4–5; answer, Rec., 47–48).

Shipments of live stock originating at Chicago are received by the Stock Yard from the consignors thereof for shipment, and are by the Stock Yard loaded through its chutes and over its loading docks and platforms into cars alongside thereof, which have been placed there by the Junction Company at the direction of the trunk-line carrier that is to finally

transport such outbound shipments, and the bills of lading issued by the trunk-line carriers cover the transportation from the receipt of the shipment by the Stock Yard from the consignors to the delivery to the consignees at final destination (bill, Rec., 5; answer, Rec., 48). Such loaded cars are hauled by the Junction Company to the trunk line (R., 59).

Shipments of live stock moving through the stock yards to destinations east or west thereof are handled in the following manner:

The trunk lines bring such shipments to Chicago, place the cars at the unloading docks, platforms, and chutes of the Stock Yard, and the latter unloads the live stock, placing the same in its pens, feeds and waters it, and thereafter reloads the said shipments through its chutes and over its loading docks and platforms into the cars of the outgoing trunk-line carrier that is to carry the shipments beyond Chicago. Such unloading, feeding and watering, and reloading are services in transferring in transit (bill, Rec., 6; answer, Rec., 49).

For the services performed by the Stock Yard Company, above set forth, the trunk-line carriers pay the Stock Yard Company a fixed sum per car out of the through rate that covers all transportation services from the receipt of shipment from consignor to final delivery to consignee. Trunk-line carriers publish such through rates, but the Stock Yard Company does not publish its charges, nor does it concur in the

tariffs of the trunk-line carriers, naming the through charges (bill, Rec., 4, 5, 6, and 7; answer, Rec., 46, 47, 48, and 49).

In the case of horses a somewhat different method is pursued. The cars containing the horses are hauled by the trunk line to the receiving tracks of the Stock Yard Company and are removed by the Junction Company to a special track, where they are unloaded by the Stock Yard Company. (R., 11.)

WEIGHING.—The Stock Yard Company maintains a scale for the purpose of weighing outbound freight from the stock yards. (R., 12.)

BILLS OF LADING.

All bills of lading are issued by the trunk lines and are not signed by either the Stock Yard Company or the Junction Company. In the case of live stock the bill of lading has attached a live-stock stub, which is retained by the auditor of the Stock Yard Company and Junction Company upon delivering the bill of lading to the local agent of the trunk line. (Rec., 46–51.)

For freight received by the Junction Company at the Union Freight Station a receipt is given to the shipper in the name of the trunk line over which his shipment moves. The shipper may exchange this receipt for a bill of lading from the trunk line, but in many instances the receipt itself is used as the bill of lading. (R., 10–59.)

TARIFFS.

Neither the Stock Yard Company nor the Junction Company at the time the suit was brought filed any tariff with the Commerce Commission. The trunk lines file their own tariffs and in them are set forth the charges of the Junction Company which the former absorb in the through rates that cover all the service performed by all. (Rec., 58–59.) The tariffs of the Junction Company are published broadcast and are known to all.

From the stipulation of counsel filed in this court, it appears that prior to 1907 the Junction Company did file tariffs with the Commission, but in December of that year, when it sold the part of its line situated in Indiana, it legally canceled said tariffs; however, there were then on file with the Commission some tariffs of the Michigan Central Railroad Company, in which the Junction Company had concurred. At the time of the cancellation of its individual tariffs, the Junction Company directed cancellation of all tariffs in which it had concurred, but its officer in charge of the matter inadvertently failed to cancel the Junction Company's concurrence in the tariffs of the Michigan Central Railroad Company, which were, therefore, in effect at the time this case was heard in the Commerce Court. Counsel on both sides think that this court should be acquainted with this matter, which was verbally called to the Commerce Court.

FREIGHT CHARGES.

The Junction Company, for the use of its tracks by the trunk lines in hauling cattle, whether through or to the Stock Yard, is paid out of the freight rate a certain amount per car. (Rec., 58.)

For hauling such live freight, as well as dead freight, the Junction Company receives from the trunk line as its share of the freight a certain sum per car, where the freight is in carload lots. (Rec., 58.)

When the freight is in less than carload lots, the Junction Company, as its share of the freight, is paid 5 cents per hundred pounds. (Rec., 59.)

The B. & O. also pays to the Junction Company a like amount out of the through freight for its services in hauling the freight to the Union Freight Station, and transferring it in transit. (Rec., 59.)

The Stock Yard Company is paid by the trunk lines as its share of the freight a certain sum per car for receiving and loading and for unloading and delivering live stock, or for transferring the stock in transit, in the case of through freight. (Rec., 4, 5, 6, 7–46–47–48.)

In the case of live stock, the freight of the trunk lines is usually paid by the Stock Yard and collected from the commission dealers twice a week. (R., 14.) In the case of charges accruing on the through transportation of cattle which are rested at the Stock Yards, the Stock Yard charges are collected by the trunk line and remitted to the Stock Yard. (R., 12.)

In the case of less than carload freight shipped from the Union Station, the charges are frequently collected by the Junction Company and turned over to the trunk line. (R., 11.)

Demurrage.—The Junction Company is responsible to the trunk line for cars detained on its tracks beyond a given time, and the Junction Company in turn collects demurrage from the consignors or shippers who keep the cars beyond the free time allowed by its rules. (R., 13.)

TRANSFER TO THE JUNCTION COMPANY.

Pursuant to the agreement mentioned, in 1897 (Rec., 32) the Stock Yard Company turned over to the Chicago and Indiana State Line Railroad Company, a corporation organized under the general railroad laws of the State of Illinois, all of its track and rolling stock. Thereafter the Chicago and Indiana State Line Railroad Company consolidated with another railroad company organized under the general railroad laws of Illinois, known as the Chicago, Hammond and Western Railroad Company, and the name of the consolidated roads was changed to the Chicago Junction Railway Company, and at the time of such consolidation the Junction Company owned and operated, in addition to the tracks of the Stock Yard, a belt railroad running around the city of Chicago. (Rec., 7.)

On November 1, 1907, the Junction Company sold to the East Chicago Belt Railroad Company all of its railroad outside of Cook County, Illinois, and

under that agreement the only railroad retained by it was that built by Stock Yard Company. (Rec., 7.)

SPECIFICATION OF ERRORS.

1. The Commerce Court erred in holding and adjudging that the Stock Yard Company is not a common carrier subject to the acts to regulate commerce.

2. The Commerce Court erred in not requiring the Stock Yard Company to comply with said acts.

3. The Commerce Court erred in dismissing the petition as to the Stock Yard Company.

4. The Commerce Court erred in holding and adjudging that the Investment Company is not subject to the jurisdiction of the Commerce Court and in dismissing the petition as to it.

5. The Commerce Court erred in holding and adjudging that the Pfaelzers were not subject to the jurisdiction of the Commerce Court and in dismissing the petition as to them.

6. The Commerce Court erred in holding and adjudging that the contract between the Pfaelzers, on the one part, and the Stock Yard Company and the Investment Company, on the other part, was not subject to the jurisdiction of the Commerce Court.

7. The Commerce Court erred in holding and adjudging that the Stock Yard Company was not a joint operator of the railway with the Junction Company.

8. The Commerce Court erred in refusing to hold that the payment to the Pfaelzers, in accordance with the contract, would constitute a rebate, concession,

or unlawful discrimination, or a device whereby the property of the said Pfaelzers would be transported in interstate commerce at less charges than would be exacted from other shippers for the same service, between the same points, and at less than the tariff charges.

9. The Commerce Court erred in not enjoining and prohibiting the performance of the said contract.

POINTS AND AUTHORITIES.

I.

The Stock Yard Company and the Junction Company are common carriers engaged in the transportation of property wholly by railroad from one State to another.

1. Both companies are engaged in the transportation of property wholly by railroad from one State to another.

(*a*) Property is in interstate commerce from its delivery to the carrier for shipment into another State until it is there delivered to the consignee.

Coe v. *Erroll*, 116 U. S., 517.
The Daniel Ball, 10 Wall., 557.
Henderson v. *N. Y.*, 92 U. S., 271.
Wabash R. Co. v. *Ill.*, 118 U. S., 557.
Rhodes v. *Iowa*, 170 U. S., 412.
Heyman v. *Southern Ry. Co.*, 203 U. S., 270.

(*b*) The commerce act specifically defines "railroad" and "transportation" to include all property and every instrumentality used, and every step taken in such interstate commerce.

Sec. 1, act of June 29, 1906.

(c) Both companies are engaged in transportation. Their activities are within both the judicial and legislative definitions.

It is immaterial if the distance be short or cars only be hauled.

M. P. Ry. v. *Gwinn Co.*, 55 Kans., 525.

Cars are the subject of carriage.

R. R. Co. v. *R. R. Co.*, 109 Ill., 135.

U. S. v. *C. & N. W. Ry. Co.*, 157 Fed., 619.

A towboat may be engaged in interstate commerce.

Moran v. *New Orleans*, 112 U. S., 69.

(d) Such transportation is wholly by railroad and from one State to another.

I. C. C. v. *C. N. O. & T. P. Ry. Co.*, 162 *U. S.*, *184*.

Southern Pac. Terminal Co. v. *I. C. C.*, 219 U. S., 498.

U. S. v. *Colo. & N. W. R. Co.*, 157 Fed., 321.

Leonard v. *Kansas City, etc., Ry. Co.*, 13 I. C. C., 573.

Standard Oil Co. v. *U. S.*, 179 Fed., 614.

Denver & R. G. R. Co. v. *I. C. C.*, 195 Fed., 968.

2. Both the Stock Yard Company and the Junction Company are common carriers.

(a) Definition of common carriers.

Niagara v. *Cordes*, 21 How., 7, 22.

Redfield on Carriers, etc., ed., 1.

Dwight v. *Brewster*, 1 Pick., 50.

Wiggins Ferry Co. v. *R. R. Co.*, 107 Ill., 450.

Gordon v. *Hutchinson*, 1 W. & S., 285.

Carriers of live stock are common carriers.

Myrick v. *Mich. Cent. R. Co.*, 107 U. S., 106, 5 Enc. Law, 2d ed., 428.

(*b*) Under their charters and by reason of their activities, both corporations come within these definitions.

Each was organized as a railroad company. They can not deny their charters.

Randolph v. *Post*, 93 U. S., 502.
Improvement Co. v. *Slack*, 100 U. S., 648.
Union Trust Co. v. *Randall*, 20 Kans., 515.

Under the Illinois constitution they are common carriers. (Art. 11, sec. 12.)

The Junction Company was conceded to be common carrier.

The properties of both companies are railroads and they are engaged in transportation within definitions of Hepburn Act.

They hold themselves out to the general public to perform these services for hire.

Union Stock Yards Co. v. *U. S.*, 169 Fed., 406.

3. The courts have held stock yards to be common carriers engaged in interstate commerce.

U. S. v. *Union Stock Yards*, 161 Fed., 919; affirmed 169 Fed., 404.
U. S. v. *Sioux City Stock Yards*, 162 Fed., 556.
Belt Ry. Co. v. *U. S.*, 168 Fed., 542.
U. S. v. *Ill. Terminal Ry. Co.*, 168 Fed., 546.
McNamara v. *Wash. Terminal Co.*, 37 App. Cas., D. C., 384.

See also *Covington Stock Yard Company* v. *Keith*, 139, U. S. 128.: *Walker* v. *Keenan*, 73 Fed., 755.

The Stock Yard Company and Junction Company are in reality partners and are but one system in the eyes of the law.

Meehan v. *Valentine*, 145 U. S., 623.

Southern Pac. Terminal Co. v. *I. C. C.*, 219 U. S., 498.

Northern Securities Co. v. *U. S.*, 193 U. S., 197.

U. S. v. *Milwaukee Refrig. Transit Co.*, 142 Fed., 247; 145 Fed. 1007; and

Kendall v. *Klapperthal*, 52 Atl., 92.

II.

The payment under the Pfaelzer contract would constitute a rebate, concession, and unlawful discrimination.

Act to regulate commerce, secs. 2, 3.

Elkins Act, sec. 1.

I. C. C. v. *Reichmann*, 145 Fed., 235.

Thomas v. *U. S.*, 156 Fed., 897.

U. S. v. *Milwaukee Refrig. Transit Co.*, 142 Fed., 247; (S. C.) 145 Fed., 1007.

C. & A. Ry. Co. v. *U. S.*, 156 Fed., 558.

U. S. v. *D., L. & W. R. Co.*, 152 Fed., 269.

A., T. & S. F. Ry. Co. v. *U. S.*, 170 Fed., 250.

Wight v. *U. S.*, 167 U. S., 512; and

N. Y., N. H. & H. R. R. Co. v. *I. C. C.*, 200 U. S., 398.

Armour Packing Co. v. *U. S.*, 209 U. S., 71.

III.

Such payment would, therefore, be unlawful on the part of the Stock Yard Company and the Investment Company, and the receipt thereof would be unlawful on the part of the Pfaelzers.

(See citations above.)

IV.

The Commerce Court had jurisdiction of the bill.

Secs. 2 and 3, Elkins law.
Secs. 2, 3, and 6, Act to Regulate Commerce.

V.

The decree in appeal 621 must be reversed and that in appeal 622 affirmed.

ARGUMENT.

I.

The Stock Yard Company and the Junction Company are common carriers engaged in the transportation of property wholly by railroad from one State to another.

1. *The Stock Yard Company and the Junction Company are engaged in the transportation of property wholly by railroad from one State to another.*

Such transportation is interstate commerce within the definitions of that term given by this court.

In *Coe* v. *Erroll*, 116 U. S., 517, 525, it is said that goods are under the protection of the commerce clause of the Constitution "when actually started in the course of transportation to another State or delivered to a carrier for such transportation."

In *The Daniel Ball* (10 Wall., 557, 565) it is said:

> Whenever a commodity has begun to move as an article of trade from one State to another, commerce in that commodity between the States has commenced. The fact that several different and independent agencies are employed in transporting the commodity, some acting entirely in one State and some acting through two or more States, does in no respect affect the character of the transportation. To the extent in which each agency acts in that transportation it is subject to the regulation of commerce.

In *Henderson* v. *Mayor of New York* (92 U. S., 271) it is said that "the transportation of a passenger from Liverpool to the city of New York is one voyage. It is not completed until the passenger has disembarked at the pier in the latter city."

In *Wabash Railroad Company* v. *Illinois* (118 U. S., 557) a State statute prohibiting a greater charge for a shorter than for a longer haul was held unconstitutional, because it applied to interstate traffic. The distinction is indicated in the statement that if the statute "could be construed to apply exclusively to contracts for a carriage which begins and ends within the State, disconnected from a continuous transportation through or into other States," it would be valid (p. 564).

And at page 572: "Whatever may be the instrumentalities by which this transportation from the one point to another is effected it is but one voyage."

In *Rhodes* v. *Iowa* (170 U. S., 412), intoxicating liquors were shipped into Iowa and unloaded on the station platform. It was held that the act of the station agent in moving the goods from the platform into the warehouse was still interstate commerce. In this and the later case of *Heyman* v. *Southern Railway Company* (203 U. S., 270) it was decided that interstate commerce included the actual delivery of the goods to the consignee.

It is clear, therefore, that goods are in interstate commerce from the moment that they are delivered to the carrier for shipment into another State until they have been delivered to the consignee.

The terms "railroad" and "transportation" as used in the commerce acts have been specifically defined in those acts to include every step within the foregoing definition of interstate commerce.

"Railroad" is defined to include all switches, spurs, tracks, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, and all freight depots, yards, and grounds used, or necessary, in the transportation or delivery of any said property. (Sec. 1, Hepburn Act.)

"Transportation" includes all instrumentalities and facilities of shipment or carriage, and all services in connection with the receipt and delivery, transfer in transit, storage, and handling of property transported. (Ib.)

Within these definitions, both judicial and statutory, both the Junction Company and the Stock Yard Company are engaged in the transportation of property wholly by railroad from one State to another. This is apparent from a brief restatement of their activities.

The Junction Company receives all freight originating with the industries on its line and hauls the same over its line to the trunk road; and in less than carload lots transfers the freight in transit at the Union Station. Dead freight, arriving at Chicago, is hauled and delivered by the Junction Company to the consignee, and all through dead freight is hauled by the Junction Company over its main line a distance of several miles from one trunk line to another.

In the case of live freight, the Junction Company hauls a distance of several miles over its link in the interstate route all freight originating at the yards, and in the case of horses arriving at Chicago, the Junction Company hauls the same more than a mile over its line from the cattle chutes to the horse platforms and stables.

The tracks and freight depot of the Junction Company are railroad within the definition of the statute and its services in hauling the freight is transportation.

By agreement between the Stock Yard Company and the various trunk lines, the Stock Yard Company has made its yard the freight depot and terminal yard of the trunk lines for the receipt and delivery of all live freight destined to or originating at Chicago, and such yard is therefore railroad within the statute; the chutes, platforms, and pens are instrumentalities of shipment, and are therefore transportation.

The Stock Yard Company, besides receiving all live stock originating at and destined to Chicago, loads and unloads such stock and transfers the same in transit in the case of shipments passing through Chicago. Such services are transportation within the statute.

The argument that the Junction Company's service is switching and not commerce is answered by the statute, which specifically includes in transportation all services in connection with the receipt and delivery of freight.

This amendment of 1906 is a legislative answer to the early case of *Kentucky, etc., Bridge Co.* v. *Louisville & N. R. R. Co.* (37 Fed., 615), in which it is said that switching is not within the statute.

But the fact is that the Junction Company actually moves freight over its own tracks, and that its charge is based upon the property hauled; in carload lots it receives pay only when the car is loaded, and in less than carload lots its charge is made on the hundred pounds. It is immaterial that the haul is but a few miles—it is still transportation (*M. P. Ry. Co.* v. *Grocery Co.*, 55 Kans., 525.)

Nor is the case affected by comparing the Junction Company to a towboat. Even if the Junction Company hauled only the car and not the freight, cars are the subject of carriage (*P. & P. U. Ry. Co.* v. *C., R. I. & P. Ry. Co.*, 109 Ill., 135; *U. S.* v. *C. & N. W. Ry. Co.*, 157 Fed., 619), and the statute defines cars as transportation. And the tug when towing a vessel engaged in interstate commerce is itself engaged in such commerce (*Moran* v. *New Orleans*, 112 U. S., 69).

From the foregoing it follows that when the services are performed by the Junction Company and the Stock Yard Company and their railroads are used in connection with the transportation of freight moving from one State to another, both the Stock Yard Company and the Junction Company are links in the interstate transportation, and are, therefore, within the commerce laws.

But, it is urged by counsel for the defendants, that they are not within the act as amended in 1906, because their transportation is all within the State of Illinois.

The original commerce act applied to carriers "wholly by railroad, or partly by railroad and partly by water, when both are used under a common control, management, or arrangement, for the continuous carriage or shipment," etc., and in the amendment of 1906 all of the foregoing clause after "wholly by railroad," was placed in parentheses.

The original act was applied by this court to a line entirely within a State, which by common arrangement with connecting lines had become a link in the interstate route. (*I. C. C.* v. *C. N. O. & T. P. Ry. Co.*, 162 U. S., 184.)

In *I. C. C.* v. *Bellaire Z. & C. R.* (77 Fed., 942), and *U. S.* v. *Chicago, etc., R. Co.* (81 Fed., 783), the courts, applying what they understood to be the principle of that case, held that the State roads participating in interstate carriage were not amenable to the law, because the evidence did not show a common control, management, or arrangement for continuous shipment.

Counsel now argues that Congress by amending the statute in other particulars and not in this has accepted the construction adopted in the last two cases; but inasmuch as even that construction would leave the defendants subject to the act if a common arrangement be shown, counsel urges, somewhat inconsistently, that the insertion of the parentheses

in the amendment of 1906 did change the statute in this very particular so as to remove from its operation a link in an all-rail route, if the transportation performed by that link is entirely within a single State.

Such a construction would destroy the statute. The great purpose of the commerce act was to place all shippers upon an equality and to compel each to pay the same rate. (*N. Y., N. H. & H. R. R.* v. *I. C. C.*, 200 U. S., 361, 391.) To accomplish this, rebates and preferences were prohibited. The intention in amending the act in 1906 was to broaden and strengthen the statute, and not to weaken it in any particular.

The construction contended for would remove from the operation of the law any line wholly within a State, even though it transported as a link in a through route freight which was moving in interstate commerce. The line within the State might give rebates and preferences without fear of prosecution. The United States could not prosecute because the statute did not cover it. The State could not prosecute because the road would be engaged in interstate commerce within the meaning of the Constitution, and its action in that particular would be beyond the control of the State. (*Norfolk & Western R. R.* v. *Pa.*, 136 U. S., 114.)

But the statute will be construed so as to carry out, and not defeat, the purposes for which it was passed (*United States* v. *Hartwell*, 6 Wall., 396; *Am. Security & Trust Co.* v. *D. C.*, 224 U. S., 491).

Since 1906 many cases have arisen under this act, but this is the only one which counsel have been able to find in which this contention has been raised. The Commerce Commission has in its every day workings construed this act as still applying to such carriers. And this court would seem to have put the question at rest in *Southern Pacific Terminal Co.* v. *I. C. C.* (219 U. S., 498, 525).

Without further consideration, therefore, of such a construction and assuming that the office of the parentheses is to limit the clause therein inclosed to transportation partly by rail and partly by water, the act is susceptible of two constructions.

One is that the act applies to the State carriers even though they act independently and make no common arrangement for continuous transportation if interstate shipments actually move over their lines.

This construction gives meaning to the insertion of the parentheses and seems reasonable, especially in view of the fact that section 1 was amended at the same time by requiring carriers to establish through routes, and under section 15 the Commission was given authority to establish such route if the carriers failed to do so. Under this authority if a carrier participates in interstate commerce the Commission may compel it to make arrangements with connecting carriers for continuous shipments.

This construction is adopted by the majority of the Court of Appeals for the Eighth Circuit in *U. S.* v. *Colo. & N. W. R. Co.* (157 Fed., 321, 329) by the Commerce Court in this case (R., 107), and by the

majority of the Commerce Commission in *Leonard* v. *Kansas City Southern Ry. Co.* (13 I. C. C. Rep., 573).

In a concurring opinion in that case, Commissioner Harlan expresses the other view that the law applies to the State link only when there exists common control, management, or arrangement for a continuous shipment.

And apparently without considering the effect of the insertion of the parentheses, the law has been applied as still requiring a common control, management, or arrangement.

Standard Oil Co. v. *U. S.*, 179 Fed., 614, 620.

But in this case the law is applicable under either construction, for the common arrangement for continuous shipments is clearly shown here.

The Stock Yard Company is the terminal of the trunk lines; in the ordinary course of business it receives the cattle from the shipper and loads them on the car, and the shipment is then begun; the Junction Company continues the shipment to the trunk line, a distance of several miles, and the trunk line completes the shipment. There is thus but one continuous journey in which the three carriers have participated.

A through bill of lading is given, and it is immaterial that it is not joined in by the Stock Yard and the Junction Company. It covers the cattle from the beginning to the end of the journey.

A conventional or contractual division of the freight is made; it is immaterial that two of the carriers alway receive the same amount—they always

render the same service. This amount as to the Junction Company is published in the tariffs of the trunk lines and is known to all.

This long-established practice makes, and is sufficient evidence of, a common arrangement between the carriers.

2. *Both the Stock Yard Company and Junction Company are common carriers.*

(*a*) A common carrier is one who undertakes for hire to transport the goods of others who may choose to employ him, from place to place. He is, in general, bound to take the goods of all who offer, unless his complement for the trip is full, or the goods be of such a kind as to be liable to extraordinary danger or such as he is entitled to refuse.

Niagara v. *Cordes*, 21 How., 7–22;
Redfield on Carriers, Ed. of 1869, 1;
Dwight v. *Brewster*, 1 Pick., 50;
Wiggins' Ferry Co. v. *East St. Louis Ry. Co.*, 107 Ill., 450–457;
Gordon v. *Hutchinson*, 1 W. & S. (Pa.), 285;

Carriers of live stock are common carriers.

Myrck v. *Michigan Central Ry. Co.*, 107 U. S., 106;
5 Am. & Eng. Enc. of Law, 2d ed., 428.

The extent or nature of the transportation, the length of the railroad, and the length of the haul are immaterial. If the carrier holds itself out to the public as ready and willing to perform particular acts of transportation, and its business of transporta-

tion is limited to those particular things, it is a common carrier as to those things.

Wiggins's Ferry Co. v. *East St. Louis Ry. Co.*, 107 Ill., 457, and cases above cited.

In the Wiggins Ferry case, a railroad was organized under the railroad and warehouse act of Illinois "solely for the purpose of transferring railroad cars, freight between different depots, warehouses, elevators, manufactories, etc., that may be on its line or may be reached by its lateral tracks," and its line was built upon a single street in the city of East St. Louis. In holding it to be a common carrier the court said:

> Every common carrier has the right to determine what particular line of business he will follow. He may hold himself out as a carrier of freight or of passengers only. So, if he holds himself out as a carrier of a particular kind of freight, or of freight generally, prepared for carriage in a particular way, he will be bound to carry it to the extent and the manner proposed. He will, nevertheless, be a common carrier.

(b) Under their charters and by reason of their activities, the Stock Yard Company and the Junction Company come within these definitions.

Each company was organized as a railroad company.

From the charter of the Stock Yard Company, as already set forth, it appears that it was authorized

not only to build its railroad, but to transport cattle, freight, and property of every kind between the railroads connected by it, with authority to fix its charges for such transportation, and that it was to be subject to any general law relating to stock yards or to railroads (R., 24).

A corporation can not deny the provisions of its charter, nor the nature of its organization.

> *Randolph* v. *Post*, 93 U. S., 502;
> *Improvement Co.* v. *Slack*, 100 U. S., 648;
> *Union Trust Co.* v. *Randall*, 20 Kans., 515.

This principle is, in fact, supported by the cases cited by the court below as holding to the contrary.

As railroads, the properties of the defendants are, under the constitution of Illinois, common to the public. That constitution (art. 11, sec. 12) provides that all railroads are—

> declared public highways and shall be free to all persons for the transportation of their persons and property thereon under such regulations as may be prescribed by law.

In the reply brief below for both the Stock Yard Company and the Junction Company the present counsel for those defendants said:

> *It is conceded in the case at bar that the Chicago Junction Railway Company is a common carrier*, but it is not conceded that the Congress of the United States has subjected or attempted to subject to the provisions of the act to regulate commerce a common carrier organized under the laws of the State of Illinois,

doing business wholly in the State of Illinois, under the facts as they appear in the record in the case at bar.

Such concession was accepted by the court below (R., 104).

As already shown in this brief, the properties of the Stock Yard Company and the Junction Company are "railroads" within the definition of the Hepburn Act, and their activities are "transportation" as defined therein.

And both companies hold themselves out to the public generally, or to such part of the public as needs their services, to perform those services for hire. This the Junction Company does by a printed tariff which is in general circulation in the city of Chicago.

But, as said by Mr. Justice Van Devanter in *Union Stock Yards Co.* v. *U. S.* (169 Fed., 406), it would be of little significance if the Stock Yard Company did not hold itself out to carry live stock for the public, for such holding out is made by all the trunk lines entering Chicago, and the Stock Yard Company stands ready and willing to conduct and actually does conduct, for hire, a part of the transportation of every live-stock shipment going over any of those roads.

3. *The lower courts have held that stock yard companies are common carriers and are engaged in interstate commerce.*

Heretofore we have discussed the matter without reference to these decisions.

In *Covington Stock Yards Company* v. *Keith* (139 U. S., 128, 136), this court said that the transportation of live stock begins with their delivery to the carrier to be loaded upon its cars, and ends only after the stock is unloaded and delivered to the consignee.

In *Walker* v. *Keenan* (73 Fed., 755, 759), the Court of Appeals for the Seventh Circuit, said that the hauling the cattle from one point to another, and providing the car, track, engine, and servants for that purpose, are no more a part of the service rendered by the carrier than are the loading and unloading and providing the appliances and servants for those purposes.

So, in the following cases it was directly held that stock yard companies are common carriers engaged in interstate commerce.

> *U. S.* v. *Union Stock Yards of Omaha*, 161 Fed., 919, 924; affirmed, 169 Fed., 404; opinion by Justice Van Devanter.
>
> *U. S.* v. *Sioux City Stock Yards*, 162 Fed., 556.
>
> *Belt Ry. Co.* v. *U. S.*, 168 Fed., 542.
>
> *U. S.* v. *Ill. Terminal Ry. Co.*, 168, Fed., 546.

In *McNamara* v. *Washington Terminal Co.* (37 App. Cas. D. C., 384), approving these decisions, it is held that the Washington Terminal Company is a common carrier.

It is true that in these cases the Stock Yard Company operated in its own name its railroad

tracks, and that Mr. Justice Van Devanter, in *Union Stock Yards* v. *U. S.* (169 Fed., 404), supra, said:

> It must be conceded that the stock yards company would not be a common carrier, nor the property used by it a railroad, if its operations were confined to maintaining the sheds or pens, to unloading shipments therefrom, and to feeding, watering, caring for, and otherwise handling live stock therein.

Inasmuch as it was held for other reasons that the Stock Yard Company was a common carrier, this remark is a dictum. That was a prosecution under the safety-appliance law, and there was not called to the court's attention the definitions of railroad and transportation in the Hepburn Act of 1906. As already shown, the property used by the Stock Yard Company is railroad, and its services are transportation, as therein defined. It is therefore a common carrier.

And the Commerce Court in following this dictum and holding that a carrier must "transport from point to point" overlooked these definitions.

But the truth of the matter is that the Stock Yard Company and the Junction Company are still component parts of one system, which was and still is within the commerce law. Prior to 1897 the Stock Yard Company operated in its own name the railroad and engaged in all the activities which caused the courts in the foregoing cases to hold stock yards to be common carriers. By separating the railroad

tracks from the stock yard itself, and undertaking to operate each under a different name, though still carrying on, for all practical purposes, their activities in the same manner as before, the Stock Yard Company did not remove either part of the system from obedience to the act.

The instrument by which the Stock Yard Company turned over the operation of its road to the Junction Company is designated a lease, and provides for a rental of $\frac{2}{3}$ of the net revenues not only of the tracks turned over under the agreement, but of all other tracks then operated or thereafter acquired by the predecessor of the Junction Company. It will be remembered that the predecessor then owned tracks running between the States of Illinois and Indiana, and was engaged to a large extent in the same character of terminal business as was the Stock Yard Company. The terms of this agreement would seem to make the Stock Yard Company and the Junction Company in reality partners in the operation of the tracks of the Stock Yard Company within the decision of this court in *Meehan* v. *Valentine* (145 U. S., 623).

The profits are to be shared between the two companies in proportions of two to one. It is significant that while the Stock Yard Company's share is designated rent, it is not payable at regular intervals, but is turned over "from time to time" as may be required by the Stock Yard Company.

But whether the two companies be legally partners or not, the evidence shows that they are in reality but

one within the decision of this court in *Southern Pacific Ry. Co.* v. *I. C. C.* (219 U. S.).

The auditor of the two companies is the same, which makes unnecessary the provision of the agreement that the Junction Company shall turn over its books to the Stock Yard Company for examination in ascertaining the profits.

The interests of these two companies are identical. The prosperity of the one means the prosperity of the other. No stock can come to the stockyard unless it moves over the lines of track operated by the Junction Company. No dead freight can move in or out of the industries located on the stockyard property and lines of railway unless it moves in or out on the lines of railroad operated by the Junction Company. The more shipments of live stock there are moving in and out of the yards, the greater revenues will the Stock Yard Company derive for its loading, unloading, and reloading, and transferring in transit, and the greater will be the revenues of the Junction Company; and the greater the revenues of the Junction Company, the greater will be the Stock Yard Company's percentage of such revenues. The Investment Company is practically the sole stockholder in the Stock Yard Company and the Junction Company. And its interest is identical with the interest of each of the other companies.

The identity of the single interest can not be concealed by the multiplication of the separate legal entities. Equity will look behind the separate

organizations to determine whether the interest of all is one and the same.

Kendall vs. *Klapperkhal* (Penn. State), 52 Atlantic Rep., 52–96.

Northern Securities Co. vs. *U. S.*, 193 U. S., 197.

Swift & Co. vs. *United States*, 196 U. S., 375.

Southern Pacific Terminal Co. vs. *Interstate Commerce Commission*, 219 U. S., 498.

U. S. vs. *M. Refrig. Transit Co.*, 142 Fed. 247; 145 Fed., 1007.

II.

The payment by the Stock Yard Company to the Pfaelzers, in accordance with the contract, would constitute a rebate, concession, and unlawful discrimination.

1. Section 2 of the act to regulate commerce is as follows:

> That if any common carrier subject to the provisions of this act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust dis-

> crimination, which is hereby prohibited and declared to be unlawful.

Section 3 of the act to regulate commerce is as follows:

> That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

These provisions were reinforced by the so-called Elkins Act, as amended June 29, 1906. It made it unlawful for "any person, persons, or corporation to offer, grant, or give, or to solicit, accept, or receive any rebate, concession, or discrimination *in respect to the transportation of any property* in interstate or foreign commerce by any common carrier subject to said act to regulate commerce and the acts amendatory thereof *whereby* any such *property* shall by any *device whatever* be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said act to regulate commerce and the acts amendatory thereof, or whereby any other advantage is given or discrimination is practiced." (Sec. 1, Elkins Act.)

It will be noted that the portion of section 1 of the Elkins Act above quoted makes unlawful a con-

tract which has for its subject matter the procuring of the transportation of property in interstate commerce by a carrier subject to the act whereby such property by a device shall be transported at less than the tariff rates of such carrier. The statute forbids any person making any kind of an agreement with another whereby the one shall procure for the other the movement of his freight at less than tariff rates.

Said section makes the tariffs so filed conclusive as against such carriers; makes the offense against the carrier complete by proof that the shipment was carried by it at less than its published rate, or that it offered a concession or discrimination that would cut its rate; and an offense by the shipper if he knowingly accepts a rebate, concession, etc., from the regular rate.

Section 1 of the Elkins law, above quoted, is broader than the provisions of the Elkins law which prescribes the punishment for the taking or giving of rebates. The act declares certain acts to be unlawful, but it does not prescribe a punishment for all persons who perform those acts. Nevertheless a contract made in violation of the declaration in the statute would be illegal, even though all the persons making the illegal agreement might not be subject to criminal punishment.

In construing the sections of the statute above quoted this court and the lower courts have stated in a broad way that it was the intention of Congress

to prevent a departure from the published rates and schedules in any manner whatsoever.

American Express Co. v. *U. S.*, 212 U. S., 532; *New York, New Haven & Hartford R. R. Co.* v. *I. C. C.*, 200 U. S., 391.

In this connection see:

I. C. C. v. *Reichmann*, 145 Fed., 235; *Thomas* v. *United States*, 156 Fed., 897; *United States* v. *Milwaukee R. Transit Co.*, 142 Fed., 247; (S. C.), 145 Fed., 1007; *C. & A. Ry. Co.* v. *U. S.*, 156 Fed., 558; *U. S.* v. *D., L. & W. R. R. Co.*, 152 Fed., 269; *A., T. & S. F. Ry. Co.* v. *U. S.*, 170 Fed., 250; and *Wight* v. *U. S.*, 167 U. S., 512.

In a number of the cases the departure from published tariffs was accomplished by payments that were said to have been made to the shippers in payment of other things, but in every instance the court looked behind the alleged transaction to ascertain whether the payment in fact showed that the carrier transported the property at less than its tariff rates or whether the shipper had his property moved at less than the tariff rates. See authorities last cited.

It is not always necessary that the shipper and the railroad act together; the shipper may, in fact, by some device, procure the transportation of the property at a cost to him of less than the tariff rates, while the carrier may in fact exact the tariff rates on such shipments.

I. C. C. v. *Reichmann*, 145 Fed., 235.
Thomas v. *U. S.*, 156 Fed., 897.

A carrier desiring to stimulate traffic can not disregard the economic conceptions upon which the interstate commerce law rests and substitute in their stead its ideas as to what is best for itself and for the public, if in carrying out such policies its increased traffic is moved at less than the tariff rates. A contract of the character indicated will be unlawful; and the violation of the statutory prohibition depends not upon the fact whether the carrier *intended* to violate the statute, but depends upon whether acts *done* are in violation of the statute. (*New York, New Haven & Hartford R. R.* v. *Interstate Com. Com.*, 200 U. S., 398.)

2. *Such payment would amount to a return to the Pfaelzers of a part or all of the moneys paid out by them as freight.*

Section 2 of the act to regulate commerce, quoted above, is generally referred to as covering the prohibition against rebating. It declares that rebating in any form is unjust discrimination, and that the same is unlawful.

Section 3 of the act to regulate commerce is the one that defines undue or unreasonable preferences in favor of any particular person, etc., and undue or unreasonable prejudice or disadvantage against other persons, etc., to be unlawful.

Usually violations of section 3 can be determined only after an investigation of all the facts. It can not be doubted, however, that the payment of money by a carrier to a shipper would be a self-evident preference and a violation of sections 2 and 3

of the act to regulate commerce, and also a violation of section 1 of the Elkins law.

Section 2 of the act to regulate commerce is violated only when one man is charged more than the other for the same service; but that would give a preference and create a disadvantage under section 3. A violation of the latter section may arise even if the preference is not to a shipper.

Section 1 of the Elkins Act is violated whenever the carrier charges or offers to charge for its transportation less than the rates contained in its tariffs, or whenever the shipper procures, or makes, or offers to make, or solicits an agreement whereby someone is to procure the movement of his freight at less than those charges.

The sections of the statute referred to make the contract a violation of law, even if the Pfaelzers were not such shippers. However, the Pfaelzers are shippers. Every year they are obliged to buy live stock in the Kansas City, Louisville, and other markets for slaughter at their plants, and for the past five years the freight charges paid by them on such shipments to the trunk lines have aggregated $2,800 annually, out of which the trunk-line carriers paid the Junction Company and the Stock Yard Company for their services in connection therewith.

We therefore have under the Pfaelzer contract an agreement on the part of the Stock Yard Company to pay to the Pfaelzers the sum of $50,000 if the latter build a slaughtering plant on the tracks of the

Stock Yard Company and maintain and operate the same for the period of 15 years, during which time the Pfaelzers are to buy at the stock yards all live stock slaughtered and packed at their plant or within 200 miles of Chicago, but if not bought at the yards must pass through the same, paying customary tolls, or pay the tolls if they do not pass through.

It is at once certain that any increase in the movement of live stock through the yards by the Pfaelzers will increase the revenues of the Junction Company and the Stock Yard Company. The Stock Yard Company will unload and deliver more cars of cattle, and the Junction Company will transport more dead freight to and from the yards. In all instances, the freight charges will be paid by the Pfaelzers, either in the price of the stock at the yards, or will be paid by the Pfaelzers direct to the trunk line carriers as the shippers of the stock which they purchase outside of Chicago, and the latter will pay the Stock Yards Company and the Junction Company their respective charges for their services rendered in such through transportation.

The Stock Yard Company then takes its two-thirds of the revenues thus accruing to the Junction Company, and its revenues accruing from its loading and delivering charges, and pays the same to the Pfaelzers.

It is claimed, of course, that the payment is made for the building of the plant, which will increase the business of the Stock Yards Company, but that increase can come only through the increased volume

of freight moving through the yards, and as a matter of actual figures if the Pfaelzers pay but $2,800 in freight charges annually, the $50,000 payment would cover their freight charges for a period of 15 years.

Every other shipper of live stock sending his cattle to the stock yards must pay the legal rates of the carriers, out of which the Junction Company and Stock Yards Company are paid for their services. If this contract is performed the shipper of live stock from Kansas City, whose cars of cattle move in the same trains with the cars of cattle belonging to the Pfaelzers, will pay the full tariff rates, while the payment in question will permit the Pfaelzer stock to move from the same points practically without charge. This clearly is a violation of section 2, and an undue preference under section 3.

The contract would be a *direct* violation of the Elkins law if the defendants filed tariffs or concurred in those of the trunk lines naming the through rates. It is an indirect violation through the departure from the through rates published by the trunk lines.

The contract can not be defended in equity against the provisions of the Elkins law because of the failure of said defendants to file tariffs. Such defense must rest on a plea of violation of section 6 of the act to regulate commerce.

For the purposes of this suit, equity will consider that to have been done which ought to have been done.

The Government contends that the contract is not only a direct violation of the sections of the acts referred to, but that it also constitutes a device whereby said provisions are violated.

If we assume for the moment the right of the carrier to make donations, it can not make them unless it publishes them in the tariffs making the enjoyment of such allowances the right of all. We do not, however, concede that the carrier under the law has a right to pay out money for the building up of industries along its line, when such donations are made upon the theory that such industries will produce an increased amount of traffic. Other points must of necessity help pay for a donation of that character, but if that is not so the donation must, in the end, be paid for by the increase in the freight traffic produced by such industries. The result is, in the latter case, that the donations will in fact be paid out of the freight charges on the increased traffic, and the industries receiving the donation will be having their freight moved for nothing until they have reached the point where the increased traffic is in excess of the donation.

The contract itself is forbidden by the sections of the statute above quoted, in plain terms, and is the same kind and character of a contract that was condemned by this court in the case of the New York, New Haven and Hartford Railway Co., 200 U. S., 398. And it will not do to say that the parties in good faith made the contract believing that they had the right so to do. It is unnecessary that the con-

tract be made in fraud to make the contract a violation of law or to make it a device forbidden by the law. (*N. Y., N. H. & H. Ry. Co., supra*, and *Armour Packing Co.* v. *U. S.*, 209 U. S., 71.)

III.

The payment of such sum would be unlawful on the part of the Stock Yard Company and the Investment Company, and the receipt thereof would be unlawful on the part of the Pfaelzers.

1. *It is unlawful on the part of the Stock Yard Company, because—*

(*a*) A common carrier is forbidden to give any such rebate, concession, or discrimination.

(*b*) The prohibition applies to all persons, whether carriers or not.

(*c*) Assuming that the agreement of 1897 is a lease, any act by the lessor Stock Yard Company is unlawful if it would be unlawful if done by the lessee Junction Company.

Section 1 of the Elkins law provides—

> That anything done or omitted to be done by a corporation common carrier, subject to the act to regulate commerce and the acts amendatory thereof, which, if done or omitted to be done by any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, would constitute a misdemeanor under said acts or under this act, shall also be held to be a misdemeanor committed by such corporation.

It has already been shown that the Junction Company is a common carrier, and therefore if this payment were being made by the Junction Company it would be illegal. Under the foregoing clause the same act being done by the lessor Stock Yard Company is also illegal.

2. *It is unlawful on the part of the Investment Company, because—*

(*a*) The prohibition applies to all persons.

(*b*) If the contract is illegal as to the Stock Yard Company, the principal, it is also illegal as to the guarantor.

> Brandt Suretyship and Guaranty (3d ed.), sec. 20.
>
> *McCanna* v. *Citizens Trust Co.*, 76 Fed., 420, 422.

(*c*) The Investment Company and the Stock Yard Company, as well as the Junction Company, are one in the eyes of the law.

The Investment Company owns over 90 per cent of the stock of the Stock Yard Company, which it procured immediately upon its organization in 1890. It controls and elects the board of directors of said company. It owns all of the stock of the Junction Company, and likewise controls and elects the board of directors of that company. It is as if John Smith was the sole stockholder in each company, and to say that for the purposes of control and actual interest John Smith would not direct the destinies of the three concerns is to indulge in a legal fiction that they are still separate entities.

The Investment Company, with its ownership of the stock of both companies, and its election of the board of directors, has the same interest in the operation of the Stock Yard Company and the Junction Company as those companies themselves. The Investment Company is in fact the same in interest as the other two companies. In its answer it admitted that, as the party most interested in the maintenance of the yards, as the party most interested in the property of the stock yards, which owns the property of the Junction Company, it had seen fit to guaranty this Pfaelzer contract, as well as to pay out in the period of years following 1891 the sum of $4,000,000 for the location of industries on its property. All of these payments had to come out of the earnings of the Stock Yard Company and the Junction Company, and were produced from interstate commerce, and must, in turn, have been paid to shippers of interstate commerce. Four millions of dollars taken from the earnings of two common carriers to carry out the policy of stimulating traffic for the building up of said properties. The money so paid out must have come from the public, and the freight charges of the two carriers might well have been reduced to the public had it not been for the payment of this large sum of money. Equity will certainly look to the identity of the interest of the Investment Company, the Stock Yard Company, and the Junction Company, and it will not allow an evasion of the law by the ordinary device of the multiplication of the one interest into separate legal entities.

Southern Pac. Co. v. *I. C. C.*, 219 U. S., 498, and cases cited on page 40.

IV.

The Commerce Court has jurisdiction of this bill.

The bill was filed under the provisions of sections 2 and 3 of the Elkins law.

The matters complained of are all violations of the act to regulate commerce and the Elkins law, committed in one form or another by all the defendants. The bill does not charge the same violations of law against all the defendants, but all the defendants in some form are charged with violations of said act, and the acts of each so charged contribute and make possible the violations of the act on the part of the other defendants.

It may be that a part of the subject-matter of this suit could have been remedied by a mandamus proceeding, but unless all the matters complained of could be adjusted by that remedy there was not a full and complete remedy at law. The remedy at law must always be as full and complete as the remedy in equity; falling short of that, the legal remedy is not adequate. Unless the remedy in equity had been pursued, there would have been at least three and possibly four separate suits to procure the relief sought in this bill.

While it is too late to raise the question of multifariousness as to this bill, it is contended that such charge would not lie if the question were still open. A bill is not multifarious merely because it asks different relief against different parties to the same bill, or because the acts complained of in the bill are not charged against all parties.

On the point that the Commerce Court had jurisdiction to and should have determined whether the Pfaelzer contract violated the law, counsel for the United States and the defendants are in accord.

V.

That portion of the decree appealed from in Case 622 should be affirmed, and the part appealed from in 621 should be reversed, with directions to enter a decree in accordance with the prayer of the petition.

WILLIAM E. LAMB,
Special Assistant to the Attorney General.
JESSE C. ADKINS,
Assistant Attorney General.

○

Supreme Court of the United States.

OCTOBER TERM, A. D. 1912.

Office Supreme Court, U. S.
FILED.
SEP 24 1912
JAMES H. McKENNEY
Clerk

THE UNITED STATES OF AMERICA, UPON THE APPLICATION OF THE ATTORNEY GENERAL, AT THE REQUEST OF THE INTERSTATE COMMERCE COMMISSION,
Appellant,

vs.

THE UNION STOCK YARD AND TRANSIT COMPANY OF CHICAGO, A CORPORATION; THE CHICAGO JUNCTION RAILWAY COMPANY, A CORPORATION; THE CHICAGO JUNCTION RAILWAYS AND UNION STOCK YARDS COMPANY, A CORPORATION; AND DAVID PFAELZER, ABE PFAELZER, AND JONES L. PFAELZER, A COPARTNERSHIP DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF LOUIS PFAELZER & SONS,
Appellees.

No. 621

CHICAGO JUNCTION RAILWAY COMPANY,
Appellant,

vs.

THE UNITED STATES OF AMERICA,
Appellee.

No. 622

BRIEF AND ARGUMENT FOR

THE UNION STOCK YARD AND TRANSIT COMPANY OF CHICAGO
and
THE CHICAGO JUNCTION RAILWAYS AND UNION STOCK YARDS COMPANY,
Appellees,

and also
CHICAGO JUNCTION RAILWAY COMPANY,
Appellant.

RALPH M. SHAW,
Solicitor for said Appellees and said Appellant.

GUNTHORP – WARREN PRINTING CO., CHICAGO

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1912.

THE UNITED STATES OF AMERICA, UPON THE APPLICATION OF THE ATTORNEY GENERAL, AT THE REQUEST OF THE INTERSTATE COMMERCE COMMISSION,
Appellant,

vs.

THE UNION STOCK YARD AND TRANSIT COMPANY OF CHICAGO, A CORPORATION; THE CHICAGO JUNCTION RAILWAY COMPANY, A CORPORATION; THE CHICAGO JUNCTION RAILWAYS AND UNION STOCK YARDS COMPANY, A CORPORATION; AND DAVID PFAELZER, ABE PFAELZER, AND JONES L. PFAELZER, A COPARTNERSHIP DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF LOUIS PFAELZER & SONS,
Appellees.

No. 621

CHICAGO JUNCTION RAILWAY COMPANY,
Appellant,

vs.

THE UNITED STATES OF AMERICA,
Appellee.

No. 622

STATEMENT.

These cases come here on appeal from the same decree entered by the United States Commerce Court.

In case No. 621 the United States (complainant or petitioner in the Commerce Court) is appellant and The Union Stock Yard and Transit Company of Chicago, a corporation, The Chicago Junction Railway Company, a corporation, The Chicago Junction Railways and Union Stock

Yards Company, a corporation, and David Pfaelzer, Abe Pfaelzer, and Jones L. Pfaelzer, a copartnership doing business under the name of Louis Pfaelzer & Sons, are appellees.

In case No. 622 the Chicago Junction Railway Company appealed from the same decree. In that case, therefore, it is appellant and the United States is appellee.

While under the rules of court the brief in No. 622 should be prepared, and in the hands of the United States prior to the time when its brief is due, and while on the other hand in 621 the brief of the appellees is not due until after the receipt of the brief from the United States, nevertheless in the interest of a coherent and orderly presentation of the entire case, and subject, of course, to the directions of the court, this brief will discuss on the merits all of the questions presented in each case, with the reservation on the part of both the appellant and the appellees to file such additional briefs, if any, as may be necessary after the receipt of the brief of the United States.

I.

THE NATURE OF THE CASE AND THE PLEADINGS.

The original suit in the Commerce Court was a suit in equity brought by the United States upon the application of the Attorney General at the request of the Interstate Commerce Commission against the Union Stock Yard and Transit Company of Chicago, an Illinois corporation (hereinafter called the "*Stock Yard Company*"); The Chicago Junction Railway Company, an Illinois cor-

poration (hereinafter called the "*Junction Company*"); The Chicago Junction Railways & Union Stock Yards Company, a New Jersey corporation (hereinafter called the "*Investment Company*"), and David Pfaelzer, Abe Pfaelzer and Jones L. Pfaelzer, a copartnership.

The bill was filed under Section 3 of the Elkins Act, and Sections 16 and 20 of the Interstate Commerce Act as amended by the Act of 1906.

In it the Government alleged that the Stock Yard Company and the Junction Company were common carriers, within the meaning of Section 1 of the Act to Regulate Commerce; that the "Investment Company" was identical in law with each of said companies. The bill prayed that said companies each be enjoined from engaging in said commerce until they should have filed lawful tariffs and reports with the Interstate Commerce Commission as required by the Act to Regulate Commerce; also that the Stock Yards Company be restrained from carrying out the terms of a certain contract said to have been made or about to be made by it with Pfaelzer & Sons which was charged to be illegal; also that the Investment Company be enjoined and restrained from carrying out its guaranty of said contract.

Broadly speaking the following questions are presented for decision:

(1) Is the "Stock Yard Company" a common carrier within the meaning of Section 1 of the Act to Regulate Commerce.

(2) Is the "Junction Company" a common carrier within the meaning of Section 1 of said Act.

(3) Is the "Investment Company" such a carrier, and, therefore, subject to the provisions of Section 1 of said Act.

(4) Irrespective of how the foregoing questions may be decided, is the contract assailed in the complaint illegal and should the "Stock Yard Company" and the "Investment Company" and the Pfaelzers be restrained from consummating it?

The answers to these questions necessarily depend upon the facts with respect to the organization and operation of the companies involved, the nature of the business in which they were engaged at the time of the institution of the suit, and the nature of the alleged contract.

The Pleadings.

These facts are contained wholly in the pleadings which consist of:

(a) The bill of complaint, together with the exhibits, filed by the United States. (Rec., 1-42.)

(b) The answer of the Stock Yard Company. (Rec., 45-55.)

(c) The answer of the Junction Company. (Rec., 55-65.)

(d) The amended answers of the Pfaelzers (Rec., 70-77), and the second amendment of the Pfaelzers. (Rec., 87-97.)

(e) And the answer of "The Investment Company. (Rec., 77-85.)

No replications were filed by the Government to any or either of these answers.

The cases are, therefore, here on bill and answer.

The rule in such cases is that all averments of the bill not denied and as well all new facts alleged in the answer must be taken as true.

In re Sanford Fork & Tool Co., 160 U. S., 247 (257).

Banks v. *Manchester*, 128 U. S., 244 (251).

II.

THE FACTS.

The facts shown by the pleadings are as follows:

(1) *The history of the Stock Yard Company and its activities:*

The Union Stock Yard & Transit Company of Chicago is a corporation created by virtue of a Special Act of the Legislature of the State of Illinois, approved in February, 1865. A copy of its charter is annexed to the bill of complaint as Exhibit "A." (Rec., 22-27.)

By Section 1 of this Act the corporation was created.

By Section 2 power was conferred upon it to locate, construct and maintain near the southerly limits of the City of Chicago:

> "* * * All the necessary yards, inclosures, buildings, structures, and railway lines, tracks, switches, and turnouts, aqueducts, for the reception, safe keeping, feeding, watering, and for the weighing, delivery, and transfer of cattle and live stock of every description, and also dead and undressed animals that may be at or passing through or

near the City of Chicago, and for the accommodation of the business of a general union stock yard for cattle and live stock, including the erection and establishment of one or more hotel buildings, and the right to use the same. * * * to make advances of money upon such cattle and live stock for freight or other purposes as may become expedient * * *."

By Section 3 it was provided:

"That said company shall construct a railway, with one or more tracks, as may be expedient, from the grounds which may be selected for its said yards, so as to connect, outside of the City of Chicago, the same with the tracks of all the railroads which terminate in Chicago, the lines of which enter the city on the south between the lake shore and the southwest corner of said city, * * * and to make connections with such suitable sidetracks, switches and connections as to enable *all of the trains running upon said railroads easily and conveniently to approach the ground selected for said yards*, and may make such arrangements or contracts with such railroad companies, or either of them, *for the use of any part or portion* of the track or tracks of such company or companies, which now is or hereafter may be constructed, for the purposes aforesaid, as may be agreed upon between the parties * * * and to transport and to allow to be transported *thereon between said railroads* and cattle yards, all cattle and live stock and persons accompanying the same to and from said yards, and may also transport and allow to be transported between the railroads entering said city, * * * freight and property of every kind as well as stock and cattle * * *."

Section 3 should be read in the light of Section 11 which contains this provision:

"Nothing in this act contained shall be

deemed, taken, or construed as conferring upon the company hereby created any powers or authority to maintain or operate a railroad for the conveyance of passengers or freight in the City of Chicago * * *."

By Section 4 power was conferred upon the Company to take and hold voluntary grants and donations of land, which might be necessary for the purposes for which the corporation was created, and in the event of its failure to agree with the owners thereof, power of condemnation was conferred upon the corporation.

After its creation the Stock Yard Company purchased and acquired real estate necessary for the construction and operation of a stock yards. Its present holdings consist of about 800 acres of land. Upon this land it has for nearly half a century been conducting its stock yards business. Pursuant to the authority vested in it by the Legislature it also built in the neighborhood of its yards a hotel which it has continuously operated from that time to this. It also constructed the railroad tracks authorized by its charter for use in connection with its stock yards. For a long period of time it operated its trains and cars over said tracks. They were, however, leased by it in 1897, and are now held and operated by the "Junction Company."

Answer of the "Stock Yard Company," Rec., 50.

Answer of the "Junction Company," Rec., 57.

A map of the tracks as originally constructed and as now operated by the Junction Company will be found on page 31 of the record.

These tracks lie wholly in the State of Illinois. *The operation thereof is probably different both in form and substance from the operation of most of the railroad track in the United States.*

These tracks intersect or connect with substantially all of the tracks of interstate carriers, hereinafter called "Trunk Line carriers," entering the City of Chicago. Dead freight coming to industries located at or near the yards may move in an unbroken line of rail carriage from points outside of the state to industries located at or near the stock yards district.

Bill of Complaint, Rec., 4.

Such freight may move on through bills of lading but—*the Stock Yard Company does not issue any bills of lading, nor does it undertake to carry, nor does it carry said freight any part of the distance over which it moves.* It does not operate the tracks or any of them, and does not participate in the revenue derived from the carriage of the freight.

Answer of the Stock Yard Company, Rec., 47.

(2) Live stock which is brought to the stock yards by the trunk line carriers from points either within or without the State of Illinois after it has been delivered at the platforms of the Stock Yard Company is unloaded by it. For this service it is paid by the trunk line carriers a fixed sum per car. The Stock Yard Company does not publish the sums paid by the trunk line carriers for this service or file with the Interstate Commerce Commission any tariff of the same.

Bill of Complaint, Rec., 5.

The service of unloading the stock is a service which the Stock Yard Company has performed for the trunk line carriers since the organization of the yards. It is rendered at the request of, and as the result of a contract between it and the trunk line carriers providing payment therefor.

Answer, Rec., 47.

Most of the stock so unloaded by the Stock Yard Company is consigned to consignees doing business at or near the yards on through bills of lading, *but the "Stock Yard Company" has nothing whatsoever to do with the carriage or the billing.*

Bill of Complaint, Rec., 5,
Answer, Rec., 48.

(3) The Stock Yard Company also when requested so to do loads live stock consigned by consignors doing business at the yards. For this service it is likewise paid a fixed sum per car by the trunk line carriers carrying the freight. It performs such loading service under a contract between it and the trunk lines, and it does not file any tariffs with the Interstate Commerce Commission with respect thereto.

Answer, Rec., 48.

The outgoing stock which it loads moves from points of origin on through bills of lading, *but the "Stock Yard Company" has nothing to do either with the issuance of the billing or with the rates or revenue received by railroads therefor.*

Bill of Complaint, Rec., 6.
Answer, Rec., 48.

(4) The Stock Yard Company is not in itself a dealer in cattle, *but it keeps and maintains a public market where all kinds of live stock are bought and sold by others.* As a part of its stock yard business it frequently feeds and waters stock in transit over the lines of the trunk line carriers. For this service it makes a charge, which is paid by such trunk line carriers to it under contract covering the same. It has performed such services since its organization. It does not and never has filed any tariffs with the Interstate Commerce Commission with respect thereto.

Bill of Complaint, Rec., 6.
Answer, Rec., 49.

(5) The Stock Yard Company also constructs when requested by trunk line carriers so to do partitions in cattle cars owned by the carriers. For this service it is paid by the owner of the equipment.

(6) It also feeds, beds and waters live stock shipped to consignees doing business at or near the yards. For this service it receives payment from the commission men engaged in buying and selling cattle at the yards. It does not file and never has filed with the Interstate Commerce Commission any tariff or schedule of such charges.

Bill of Complaint, Rec., 6.
Answer, Rec., 49.

(7) When the trunk line carriers bring live stock to the stock yards, the waybills accompanying said stock are handed by the employes of the trunk line carriers transporting the stock to the employes of the Stock Yard Company with what is termed a

"live stock stub" attached. Such waybills are taken by the employes of the Stock Yard Company to unload and count the animals in each car, and then the waybills, together with the stub are sent to the auditor of the Stock Yard Company. The live stock stub is retained by such auditor, and the original waybill is delivered to the local agent of the trunk line company delivering stock at the stock yards. The charges appearing on the waybills are collected by the Stock Yard Company from the consignees doing business at the yards. The Stock Yard Company advances to the trunk line carriers all charges, and twice a week it collects from the consignees the moneys it has advanced to the railroads.

Bill of Complaint, Rec., 14.

The Stock Yard Company advances these charges for *the accommodation and convenience of the patrons and customers of the Stock Yard Company.* These customers are the commission men, buying and selling live stock at the yards. The charges which the Stock Yard Company make for loading and unloading stock have nothing to do with the advances made by the Company on behalf of said consignees or commission men.

Bill of Complaint, Rec., 14.

Answer of the Stock Yard Company, Rec., 51.

(8) If any feeding charges accrue on stock originating at the stock yards, the Stock Yard Company, will notify the agent of the trunk line carrier, and that carrier collects such charges at the point of final destination, and remits them to the Stock Yard

Company. Such charges are not published or filed with the Interstate Commerce Commission in any tariff issued by the Stock Yard Company.

Bill of Complaint, Rec., 12.
Answer, Rec., 50.

(9) The trunk line carriers (transporting interstate shipments to and from points in the stock yards district) are not all supplied with scales. The Stock Yard Company maintains an office called the register's office, which furnishes weights on all outgoing freight from the stock yards. The men operating the register's office and performing said weighing are employes of and are paid by the Stock Yard Company, but the expense of maintaining such office is divided pro rata among the railroads making use of such service, and the Stock Yard Company is reimbursed for its expense in maintaining the same. The scales used in weighing such shipments are the same scales that are used by the Stock Yard Company when live stock is weighed for commission men doing business at the yards, and they are necessary for the use of the Stock Yard Company in the transaction of its stock yard business.

Bill of Complaint, Rec., 12.
Answer, Rec., 50.

(10) As has been stated, the defendant, the Stock Yard Company pursuant to the powers conferred upon it in its charter, leased all of its railroad to a corporation known as the State Line Company on February 15, 1897. It retained for its own corporate purposes only the loading and unloading platforms and facilities that it had constructed and used in con-

nection with its stock yards business. *From that time to this it has not operated, and has had nothing whatsoever to do with the operation of the railroad tracks.*

(2) *The History of the Junction Company and its activities:*

There was in existence in Illinois on December 15th, 1897, a corporation known as the Chicago & Indiana State Line Railway Company, hereinafter called the "State Line Company."

Bill of Complaint, Rec., 6.

Said State Line Company was organized under the general railroad act of the State of Illinois. On December 15, 1897, the said State Line Company entered into a lease with the "Stock Yard Company." A copy of said lease is attached to said bill of complaint and marked Exhibit "D."

By it the Stock Yard Company leased unto the State Line Company for a term of 50 years:

> All its railroad and railroad tracks, roundhouses, repair shops, machine shops, coal chutes, signal houses, then in existence, or theretofore used by the Stock Yard Company in connection with its railroad, and also all and singular all of the equipment and the telegraph lines, instruments and appurtenances owned or possessed by the railroad necessary or useful in or about the operation of the railroad tracks. Also the right in the future to maintain and operate upon the lands of the yards additional sidetracks and switch tracks and other appurtenances incidental or necessary to the useful and successful operation of a railroad, and also the franchise rights to operate such tracks.
>
> *Exhibit "D," Rec.,* 33.

Under the demise the lessee was to pay as rental to the lessor two-thirds of the entire net earnings, derived from the use of the property demised. (Rec., 35.)

Afterwards the State Line Company consolidated its railroad property with a certain other railroad corporation known as the Chicago, Hammond & Western Railroad Company. The consolidation agreement provided that the consolidated company should be known as the "Chicago Junction Railway Company." (Rec., 7.)

At that time, and as the result of the consolidation the Junction Company owned and operated, in addition to the tracks leased by the "Stock Yard Company" to the State Line Company, a belt line running around the City of Chicago from a point called Franklin Park, northwest of the City of Chicago in and to the City of Hammond, Indiana, and thence to Whiting, Indiana.

Bill of Complaint, Rec., 7.

But in November, 1907, the Junction Company sold to the East Chicago Belt Railroad Company, all that portion of its railroad running from Franklin Park to Hammond and Whiting, and divested itself of each, every and all of its railroad tracks excepting that part which had been leased to it by the Stock Yard Company under the lease of December 15, 1897.

Bill of Complaint, Rec., 7.

Answer, Rec., 57.

The Junction Company thereafter, and at the time of the commencement of the lawsuit, did not

own or operate any track or railroad except those operated by it under the lease from the Stock Yard Company.

These tracks are located wholly within the County of Cook and State of Illinois. They consist of main tracks running east and west from a point on the lake front, in the City of Chicago, near the intersection of Thirty-ninth street, and the tracks of the Illinois Central Railroad Company, westerly 8¼ miles to a point in the State of Illinois. In addition to the main tracks running between those two points, the company operates a large number of switch tracks in and through the stock yards district to the industries located there.

Bill of Complaint, Rec., 8.
Answer, Rec., 57.

THE DETAILS OF THE OPERATION OF SAID TRACKS.

(1) Through trains of interstate freight hauled by the motive power of trunk line carriers frequently use these tracks in order to pass from trunk lines easterly of the city to trunk lines westerly of the city and *vice versa*. Such carriers pay a trackage charge for such use—a *fixed sum per car to the Junction Company regardless of the character of the commodity contained in the car, or where the same is received, or its destination, or the amount of revenue derived by the trunk line from the haul*. The Junction Company has no interest whatsoever in the rate or the commodity.

Bill of Complaint, Rec., 8.
Answer, Rec., 58.

(2) Large numbers of cars loaded with dead freight in *carload lots* are brought into the State of Illinois by trunk line carriers from points outside of the state destined to points inside the district served by the Junction Company, or to industries located at or near its rails. Sometimes such freight is destined to points beyond the district served by the Junction Company. These cars are placed by the trunk line carriers on what are known as the receiving tracks of the Junction Company. Each car is marked by the trunk line carrier handling the same so as to show the name of the consignee, and indicate the point to which the same is to be transported by the Junction Company. The Junction Company without any order or any arrangement made with the consignee or any other person, picks up such car, and with its own motive power carries it from such receiving track to the industry or consignee designated by the Trunk Line Company. If the freight is destined to some point beyond the rails of the Junction Company, the Junction Company transports the car to the receiving track of the outgoing trunk line carrier. Such freight moves on through bills of lading. *But—the Junction Company does not issue or handle the bills of lading, and has no negotiations with either consignors or consignees for such freight. The service which the Junction Company performs is a switching service. For this service in making the switch from the receiving tracks to other points on its own rails, or to the receiving tracks of the outgoing trunk line carrier, the Junction Company is paid a fixed*

switching charge by the trunk line carrier. This charge is the same for all cars of freight, irrespective of the commodity, or of its origin, or of its destination, or of the amount of revenue received from the haul by the trunk line carrier.

The trunk line carrier in each instance absorbs this switching charge.

All of the trunk line carriers have agents in the Stock Yard district who attend

(a) to the collection of freight charges on inbound freight,

(b) to the ordering of cars wanted by shippers,

(c) the issuance of bills of lading on outgoing freight, and

(d) to such negotiations as may arise between the consignee and the carrier with respect to the surrender of bills of lading for inbound freight or other matters.

The Junction Company deals solely with the trunk line carriers. It does not negotiate with the shippers or consignees respecting either incoming or outgoing freight.

Answer, Rec., 58.

(3) When shippers located in the stock yard district wish cars for loading either dead or live freight, the car is placed at the loading docks by the Junction Company upon an order received by the Junction Company *from a trunk line carrier.* For this switching service the Trunk Line Carriers pay the Junction Company a switching charge which the trunk line carriers absorb in each instance. The Junction Company issues no billing of any kind. All

billing is issued by the trunk line carriers. *The compensation which the Junction Company gets for the outbound movement is a mere switching charge and is the same in all instances irrespective of the character or of the origin or destination of the cars of freight or of the length of the haul, or of the revenue derived by the trunk line carrier therefrom.*

Bill of Complaint, Rec., 8 *and* 9.
Answer, Rec., 58 *and* 59.

(4) There is located in the stock yard district on the tracks operated by the Junction Company a station known as the Union Freight Station. This station handles what is known as "L. C. L. (less than carload lots of freight) freight." Various industries located in or about the stock yards deliver L. C. L. freight to the Union Station where the Junction Company places it in a car belonging to the trunk line company, which will eventually receive the car from the Junction Company and make the line haul. The cars when so loaded are moved by the Junction Company from the Union Station, and placed on the receiving tracks of the outgoing trunk line carriers. From such receiving tracks the trunk line carriers pick up the cars with their own motive power and take them to their final destination. *The Junction Company receipts for such freight in the name of the trunk line carrier which contracts to make the line haul. It will not receipt to the shipper in its own name.* Each of the trunk lines terminating in Chicago has furnished the Junction Company with stamps to be used by it. A

copy of one of said stamps is shown in the bill of complaint on page 10 of the record. *The receipts so issued in the name of the Trunk line* may be exchanged at the office of the trunk line carrier for more formal bills of lading if the consignors desire it.

In case of prepayment of L. C. L. freight, the Junction Company collects the charges and receipts for such payment *in the name of the trunk line carrier*, and remits the collection so made to the trunk line carrier.

With respect to all L. C. L. freight the Junction Company makes no charge to the shipper or consignee. It is paid for its service as detailed above by the trunk line carrier making the line haul at the rate of five cents per hundred weight on all freight handled.

Bill of Complaint, Rec., 11.
Answer, Rec., 59.

(5) The Junction Company has an arrangement with the Baltimore & Ohio Railroad Company, a trunk line carrier, by which the latter brings from points east of Chicago L. C. L. freight destined to points west of and outside of the State of Illinois. Such L. C. L. freight is delivered by the Baltimore & Ohio Company to the Junction Company in Illinois, at its Union Station, and the Junction Company unloads such L. C. L. shipments, distributes it into cars of western trunk line carriers, and delivers said cars to the receiving tracks of said trunk line carriers. For this service the Junction Company is paid by the Baltimore & Ohio Railroad Company

five cents per hundred pounds. *The Junction Company does not know the shipper in the transaction and the service rendered is a matter of contract between it and the Baltimore & Ohio Railroad Company.*

(6) It frequently happens that the trunk line railroads originating shipments of live stock outside of the State of Illinois and destined to points in the stock yards district in Illinois will haul the same with their own motive power over the tracks of the Junction Company to the unloading docks in the stock yard district. For this privilege the Junction Company charges each of the trunk line carriers so using said tracks a trackage charge, *which is a fixed sum per car upon every car passing over the tracks, and is the same irrespective of the origin of the freight or of the length of the haul, or of the character of the live stock contained in the cars, or of the revenue derived by the trunk line carrier for making the haul.*

Bill of Complaint, Rec., 11.
Answer, Rec., 60.

(7) In many instances carload shipments of horses originating outside of Illinois and destined to points in the stock yards district are transported from points of origin to Chicago in stock trains of the trunk line carrier to what is known as the loading platforms of the Stock Yard Company, and there the car containing the horses is set aside and picked up by the Junction Company and hauled by it to the unloading chutes specially provided by the Stock Yard Company for the accom-

modation of horses. For this service the Junction Company, in addition to the trackage charge referred to in paragraph (6) above, is paid a regular switching charge of so much per car. This switching charge is the same *irrespective of the origin of the freight or of the tonnage in the car.*

Although the foregoing freight may be handled on through bills of lading, *the Junction Company does not issue the billing or handle the billing in any way whatsoever.*

The Junction Company does not make or participate in the rate upon either carload, or L. C. L. dead freight, or live stock, or horses, nor does it issue any bills of lading with respect to any kind of freight. It has no transactions with respect either to the rate or to the issuance or surrender of bills of lading, or to negotiations between the carriers and the shippers.

The charges of the Junction Company are in all the instances referred to in the bill of complaint paid to the Junction Company by the trunk line carriers and is a fixed sum per car.

Bill of Complaint, Rec., 12.
Answer, Rec., 60.

(8) The Junction Company is responsible to trunk line railroads for such cars as are detained on its tracks longer than a given time, and the Junction Company in turn collects demurrage from any consignors or consignees of interstate freight who detain the cars longer than the free time allowed by the rules of the Junction Company.

Bill of Complaint, Rec., 13.
Answer, Rec., 61.

(9) The Junction Company also has scales suitable for the weighing of cars, and frequently, at the request of the shipper or consignee of interstate freight, weighs such freight, and for such service is paid by the consignor or consignee a fixed sum. It also weighs all interstate freight consigned to the Stock Yard Company, for which it receives compensation from the Stock Yard Company.

Bill of Complaint, Rec., 13.

Answer, Rec., 61.

(10) The method which the Junction Company has adopted for the operation of its tracks is substantially the same as the method which was in existence for the use and operation of the freight tracks by the Stock Yard Company before the lease to the State Line Company in December, 1897.

(11) The Junction Company has published tariffs showing the charges which it exacts and collects for its services in the transportation of property, as hereinbefore set forth, and also the charges that it makes for freight handled and transported by it in the method hereinbefore set out and delivered to it at the Union Freight Station. Such tariffs are in general circulation in and about the City of Chicago and especially about the Stock Yards district, but the tariffs have not been filed with the Interstate Commerce Commission.

Answer, Rec., 62.

(12) The respective trunk line carriers engaged in the transportation of property have published and now have on file with the Interstate Commerce Commission their tariffs which show the charges

exacted by the trunk lines for the services performed by them, and which show the charges of the Junction Company for the services performed for them by the Junction Company. The Junction Company, however, does not concur or join in said tariffs, and is in no way a party to said tariffs.

The Junction Company does not publish any tariffs with respect to freight originating at industries along the lines of its railroad and destined to points in other states or on the line of any other railroad.

Bill of Complaint, Rec., 15.
Answer, Rec., 62.

(3) *History of the defendant, the Chicago Junction Railways and Union Stock Yards Company, otherwise known as "The Investment Company," and its activities.*

The Chicago Junction Railways and Union Stock Yards Company is a corporation organized under the laws of the State of New Jersey as an investment company, with its principal place of business in the City of New York and State of New York. A copy of its charter is attached to the bill of complaint and marked Exhibit "B" (Rec., 27).

Immediately upon the organization of the corporation in 1890 it acquired and became the owner, and is now the owner of, and was on the date of the filing of the bill of complaint, the owner of over 90 per cent. of the shares of the capital stock of the Stock Yard Company.

It also owned at such time all of the shares of

the capital stock of the Junction Company, except the few necessary to qualify its directors.

The greater part of its income is derived from the earnings and dividends on the stock owned by it in the Stock Yard Company, and the Junction Company. However, it has substantial investments in other enterprises from which it receives an annual income. At the time of the filing of the bill of complaint in this case there was outstanding in the names of third persons a number of the shares of stock of the Stock Yard Company over which the Investment Company had no control, and no financial or other interest.

Bill of Complaint, Rec., 16.
Answer, Rec., 80.

The Investment Company does not own the property of either the Stock Yard Company or the Junction Company, and it has no legal interest in the property of either of said companies, and does not manage or control the same.

Answer, Rec., 80.

(4) *The facts with respect to the assailed contract.*

The defendants, David Pfaelzer, Abe Pfaelzer and Jones L. Pfaelzer, were a copartnership engaged in the slaughtering business. Their plant was located at the time of the filing of the bill of complaint in this suit in the vicinity of the tracks operated by the Junction Company, and the cattle pens of the Stock Yard Company. Said firm purchased live stock, sheep, cattle and hogs from time to time at points outside of the State of Illinois which it

shipped to itself at the stock yards. Said shipments moved from the points of origin to the consignee at Chicago in substantially the manner hereinbefore outlined for the movements of all live and dead freight to industries located at or near the Stock Yards.

Bill of Complaint, Rec., 17.

Since the filing of the said bill of complaint, said partnership has been incorporated, and a corporation under the name of Louis Pfaelzer & Sons has succeeded to the business of the partnership.

Answer, Rec., 92.

The movement of all freight consigned to Louis Pfaelzer & Sons tends to increase the business of the Stock Yard Company, and also the business of the Junction Company and, therefore, the revenues of each.

Bill of Complaint, Rec., 17.

While engaged in their business in 1906, the Department of Agriculture inspected the packing plant and notified the Pfaelzers to make certain changes. The Pfaelzers endeavored to comply with such order (Answer, Rec., 93), but in October, 1908, they were directed by the Department to erect a new plant that would meet with the regulations and requirements of the Department. Pfaelzer & Sons then endeavored to secure a suitable site. (Rec., 94.) Shortly afterwards on, to-wit, the 8th day of January, 1909, Pfaelzer & Sons received a further notice from the Government notifying them that after April 10, 1909, the Government would deny to them the further inspection of the products of their plant.

Pfaelzer & Sons thereupon called upon the officers of the Stock Yard Company for financial assistance in the matter of the erection of a new and modern packing plant. The Stock Yard Company refused the assistance, and Pfaelzer & Sons thereupon took steps to secure a new site in Kansas City, Missouri.

Answer of Pfaelzer & Sons, Rec., 94.
Answer of Jersey Company, Rec., 81.

The Stock Yard Company, learning of the proposed removal of the packing plant to Kansas City, resumed negotiations with the Pfaelzers, and as the result thereof the Stock Yard Company agreed with Pfaelzer & Sons to enter into the contract, which is assailed in the bill of complaint, and is attached to the bill of complaint as Exhibit "E."

The proposed contract after the recital of certain facts contained the following covenants:

(1) The Stock Yard Company agreed to pay to Pfaelzer & Sons $50,000 towards the construction of a modern slaughtering, packing and canning plant adjacent to the stock yards.

(2) Pfaelzer & Sons agreed to construct such a plant with a capacity for a daily kill of 250 cattle, 250 hogs, and 250 sheep; that the total cost of the plant should be $125,000, and that the plans therefor should prior to such construction be approved by the president of the Stock Yard Company.

(3) The $50,000 to be contributed by the Stock Yard Company to the partnership was to be paid as follows:

$25,000 when $50,000 of work should have been done upon the buildings and machinery, and the re-

maining $25,000 when $50,000 more of work and material had been expended in the construction.

(4) Pfaelzer & Sons agreed that for a period of 15 years they would conduct a general slaughtering and canning business at the proposed plant; that all the cattle and other live stock slaughtered by them about the City of Chicago, or within 200 miles thereof should be bought at the Chicago Stock Yards, or if not bought there should use the yards and pay the customary yardage, tolls, and charges; that the conduct of the business should be continuous except as interrupted by strikes, fires or cyclones, or other causes beyond their control, and that in the event it was so interrupted that it would be resumed again at the earliest possible moment.

(5) Pfaelzer & Sons further agreed that during said period of 15 years that they would not organize any other slaughtering, packing or canning plant in any other city or state, or become interested in any other such plant, but it was provided that nothing therein contained should prevent Pfaelzer & Sons from organizing a corporation for the purpose of taking over their business.

Exhibit, Rec., 40.
Answer of the Stock Yard Company, Rec., 53.
Answer of Pfaelzer & Sons, Rec., 94.

The performance of this contract by the Stock Yard Company was guaranteed by the Investment Company.

Bill of complaint, Rec., 41.
Answer of the Jersey Company, Rec., 81.

As applied to this contract the Stock Yard Company's answer, which is not controverted, shows the following to be the facts:

There are competitive stock yards established in many cities in the States of the United States, such as Sioux City, Iowa; Omaha, Nebraska; Kansas City, Kansas; St. Louis, Missouri; East St. Louis, Illinois, and Fort Worth, Texas. All of said stock yards have built up and established their business in competition with the Stock Yard Company of Illinois by offering and giving inducements, either in the shape of land or money, to packing houses or other industries to locate at or near the yards.

The contract made by the Stock Yard Company with Pfaelzer & Sons was made for the express purpose of maintaining itself as a stock yards, and increasing the volume of said business, and of protecting the business of the defendant in competition with other stock yards.

The Stock Yard Company admits in its answer that the execution and performance of the contract will tend to increase the amount of interstate freight moving over the tracks of the Junction Company; that it will also tend to increase the yardage to be collected by the Stock Yard Company, and that it might tend to increase the earnings of the Junction Company, and thus to increase the rentals resulting to the Stock Yard Company from the lease of these tracks. (Answer, Rec., 54.) But the Stock Yard Company denies that such a payment would constitute a payment of money in violation of the Act to Regulate Commerce, or of the Elkins Act.

Answer of the Stock Yard Company, Rec., 54.

Continuing, the Stock Yard Company claims the legal right to make like payments, at any time, either in money or property, for the purpose of protecting, maintaining and increasing its business whenever in the judgment of its board of directors it may be necessary so to do.

It alleges that the payment provided for in the contract has nothing whatsoever to do with the transportation of property and the rates and charges therefor, and no connection therewith.

It avers that such payments if made either to Pfaelzer & Sons, or to others for like purposes will be made for the purpose of increasing the business at the yards, and will not be in violation of any lawful act of Congress in existence.

If Pfaelzer & Sons had left the Stock Yard Company, and had gone to Kansas City, it would have been a direct loss to the stock yards.

THE INVESTMENT COMPANY'S CONNECTION WITH THE ASSAILED CONTRACT.

The Investment Company guaranteed the contract of the Stock Yard Company for the purpose of protecting its investment in the stock of the Stock Yard Company.

Answer of the Investment Company, Rec., 81-82.

The contract of guaranty was made because the Investment Company believed it to be its best interest to do so. The payments to be made by it under its guaranty were entirely separate and distinct from

any published tariffs of any railroad company, and have no connection directly or indirectly therewith, and have nothing whatever to do with charges made for transportation or the payments due from a shipper to a carrier therefor.

The business of the Stock Yard Company depends upon a stable demand and market created by the existence of numerous slaughtering, packing and canning establishments located at or near the yards.

It is impossible to maintain a stock yards at Chicago without having this demand, and the removal of establishments now situated in the immediate vicinity of the yards would greatly diminish the demand for live stock, the number of buyers, and correspondingly diminish and reduce the shipments of live stock, and the gross and net earnings of the Stock Yard Company.

For more than 25 years the Chicago Stock Yards have been competing for business with other yards established in other cities, such as Kansas City, Omaha, East St. Louis, Milwaukee, Fort Worth and Oklahoma. The corporations owning and operating stock yards at such other places have always subsidized slaughtering, canning and packing establishments. Such practice began in the St. Louis Yards in 1876 and has continued down to the present time; the latest instance is a subsidy paid by the Yards at Fort Worth and Oklahoma during the year 1910. In order to meet the competition and the inducements offered by competitors and thus to prevent the removal of the live stock market to other points, it has heretofore been deemed necessary by the In-

vestment Company, as the party most interested in the yards, to offer inducements and to grant subsidies so as to secure the maintenance and continuance of existing slaughtering, canning and packing establishments. To this end, beginning 1891 and continuing down to the present time, it has been the policy of the Investment Company to grant large inducements and subsidies to such existing establishments, and to make agreements for grants or subsidies, in consideration of covenants on the part of owners of slaughtering, canning and packing establishments to continue their business in the vicinity of the yards, and to purchase their live stock at the yards, or to establish new plants, and make such purchases at the yards.

Since July, 1891, it has expended more than $4,000,000 in such contracts, and by reason of such expenditures it has prevented the removal of many plants located in the vicinity of the Chicago yards, has increased the facilities and buying capacity of existing plants and has promoted and secured the location of other plants, thereby increasing and protecting the live stock market at Chicago and greatly adding to its revenue. (Rec., 84.)

III.

THE CONTENTION OF THE DEFENDANTS.

(1) While one or more of the defendants might have assailed the bill of complaint as being multifarious, nevertheless having in mind that a decision upon the merits of the questions involved would be of

far greater importance both to the Government and to the defendants, than the mere winning of a lawsuit upon some technical ground, *none of the defendants* have raised the defense of multifariousness, and they do not raise it now, but frankly and squarely meet each of the issues raised by the Government, and desire a decision upon the merits thereof.

Hefner v. *N. W. Life Ins. Co.*, 123 U. S., 747 (751).

Oliver v. *Piatt*, 44 U. S. (3 Howard), 333 (412).

(2) As to the merits of the case, the defendant, the Stock Yard Company under the facts insists:

(a) That it is not a common carrier within the meaning of Section 1 of the Act to Regulate Commerce.

(b) That whether it is a common carrier or not it has the right to now, and at all times to pay bonuses for the purpose of inducing any industry, or plant of any kind to locate at or near its yards, or to prevent any industry now located at or near its yards from removing therefrom.

(3) The Junction Company is, of course, not interested in the question of the contract made by the Stock Yard Company, but for itself it insists that it is not a common carrier engaged in interstate commerce within the meaning of Section 1.

(4) As to the reports required by Section 20 of the Act; each of said Companies takes the position that the bill of complaint does not show that any order has ever been entered by the Commission requiring them, or either of them to file any report under Sec-

tion 20 of the Act to Regulate Commerce, and therefore, that question is not presented in these cases.

(5) The Investment Company insists:

(a) that the mere fact that it is the owner of some of the stock of the Stock Yard Company, and all of the stock of the Junction Company does not make it identical with either or both of said companies; and

(b) *It likewise insists* that the fulfillment by it of its guaranty on the Pfaelzer contract is not a violation of any provision of any lawful act of Congress.

IV.

THE DECISION AND DECREE OF THE UNITED STATES COMMERCE COURT AND ERRORS ASSIGNED

The original decision and decree of the Commerce Court will be found on pages 99 to 121 of the record.

Its analysis of the questions presented will be found on pages 103 and 104. The first question considered was:

By its decision and decree the court (Judge Archbold dissenting) found:

> That the *Junction Company* is a common carrier within the meaning of Section 1 of the Act and decreed that within 60 days thereafter it should file its tariffs with the Commission as required by Section 6.
>
> Rec., 108-121.

The court found unanaimously,

> (a) That the *Stock Yard Company* was not a common carrier within the meaning of Section 1; (b) that it was the owner of a railroad within the meaning of that phrase as used in Section 20 of the Act, but that the Commission had never

ordered it to make a report under the provisions of Section 20; and (c) that the court did not have jurisdiction to determine whether the assailed contract was or was not illegal.

The bill was, therefore, dismissed as to the Stock Yard Company on two grounds, as to the first two questions for want of equity and as to the third for want of jurisdiction. (Rec., 110-111-120-121.)

The court found that the *Investment Company* was not a common carrier, and, therefore, dismissed the petition as to it both for want of equity and for want of jurisdiction.

The court having found that it had no jurisdiction to determine the legality of the assailed contract, the bill was also dismissed as to the Pfaelzers for want of jurisdiction. (Rec., 111-121.)

From this decree the Junction Company has appealed, asserting that the decree was erroneous in five particulars.

But—upon analysis these assignments of error raise only one question, to-wit:

Is the Chicago Junction Railway Company a common carrier within the provisions of Section 1 of the Act to Regulate Commerce, and therefore subject to the provision of Section 6?

The Government has also appealed, asserting the decree was erroneous in nine particulars:

But upon analysis they present only three questions:

First: Is the Stock Yard Company a common carrier within the provisions of Section 1 of the Act

to Regulate Commerce, and, therefore, subject to the jurisdiction of the Commission?

Second: Is the Investment Company subject to the jurisdiction of the Commission? and,

Third, Irrespective of whether either of these companies is or is not subject to the jurisdiction of the Commission, has the United States Commerce Court jurisdiction to determine the legality of the assailed contract, and if so is the contract unlawful?

In the presentation of the various questions presented by these cross appeals, we will consider first: the question raised by the appeal of the Chicago Junction Railway Company and, secondly, the questions raised by the appeal of the government.

II.

BRIEF AND POINTS.

1.

THE ACT TO REGULATE COMMERCE DOES NOT APPLY TO ALL CARRIERS OR TO ALL COMMERCE.
FOR THE PURPOSES OF THIS CASE, BEFORE A CORPORATION IS SUBJECT TO THE PROVISIONS OF THE ACT IT MUST SIMULTANEOUSLY BE

(a) A common carrier,

(b) A common carrier wholly by railroad, and also

(c) A common carrier wholly by railroad engaged in the transportation of passengers or property from one state or territory to another.

2.

A COMMON CARRIER BY RAILROAD WHOLLY WITHIN ONE STATE CAN SO TRANSACT ITS BUSINESS AS NOT TO SUBJECT ITSELF TO THE PROVISIONS OF THE ACT TO REGULATE COMMERCE.

Cincinnati, N. O. & Texas Pacific Ry. Co. v. *Interstate Commerce Commission*, 162 U. S., 184 (191).

3.

THE CHICAGO JUNCTION RAILWAY COMPANY, OTHERWISE KNOWN AS "THE JUNCTION CO.," IS NOT A COMMON CARRIER SUBJECT TO THE PROVISIONS OF THE ACT TO REGULATE COMMERCE, BECAUSE IT IS NOT ENGAGED IN THE TRANSPORTATION OF PASSENGERS OR PROPERTY FROM ONE STATE TO ANOTHER.

(1) It lies wholly within one state.

(2) It does not issue bills of lading.

(3) It does not deal either with the consignor or

the consignee with respect to either inbound or outbound freight.

(4) It does not receive as compensation for its services any proportion of a through rate, otherwise known as a "conventional division of rates."

(5) When it hauls with its own motive power any freight on its own tracks it receives a flat switching charge therefor irrespective of the origin or destination or character of the freight.

(6) When foreign carriers use its rails, they pay to it a fixed trackage sum per car irrespective of the origin, destination or character of the freight or of the revenue derived therefrom.

U. S. ex rel. I. C. C. v. *C. K. & S. R. Co.*, 81 Fed., 783.

Interstate Commerce Commission v. *B. Z. & C. Ry. Co.*, 77 Fed., 942.

U. S. ex rel. Interstate Commerce Commission v. *C. K. & S. R. Co.*, 81 Fed., 783.

Gracie v. *Palmer*, 8 Wheaton, 605.

4

THE RELATION OF THE JUNCTION COMPANY TO FREIGHT CARS LOADED WITH INTERSTATE COMMERCE, WHICH IT HAULS WITH ITS OWN MOTIVE POWER FROM RECEIVING TRACKS IN ILLINOIS TO UNLOADING PLATFORMS IN ILLINOIS, IS ANALOGOUS TO AND IDENTICAL WITH THE RELATIONSHIP OF A TUG BOAT TO AN INCOMING STEAMER.
A TUG BOAT IS NOT A COMMON CARRIER.

The Steamer Webb, 14 Wall., 406, 414.

The Margaret, 94 U. S., 494.

The L. P. Dayton, 120 U. S., 337.

The Propellor Burlington, 137 U. S., 386.

The J. P. Donaldson, 167 U. S., 599, 603.

5.

THE UNION STOCK YARD AND TRANSIT COMPANY OF CHICAGO, OTHERWISE KNOWN AS THE "STOCK YARD CO.," IS NOT SUBJECT TO THE PROVISIONS OF SECTION 1 OF THE ACT TO REGULATE COMMERCE BECAUSE

(a) It is not a common carrier;

(b) It is not engaged in the transportation of property or passengers from any point in one state to any point either in or without a state.

Kentucky & Ind. Bridge Co. v. *L. & N. R. R. Co.*, 37 Fed., 567.

Cattle Raisers Assn. v. *Ft. W. & D. C. R. Co.*, 7 I. C. C., 513 (536).

6.

WHEN AN ACT OF CONGRESS HAS BEEN CONSTRUED BY THE COURTS AND THEREAFTER THE ACT IS AMENDED OR RE-ENACTED, AND THE AMENDMENTS DO NOT AFFECT IN ANY WAY WHATSOEVER THE PROVISIONS SO CONSTRUED, THEREAFTER THE COURTS WILL ASSUME THAT CONGRESS HAS APPROVED AND ADOPTED THE JUDICIAL INTERPRETATION PLACED UPON ITS LANGUAGE; ALSO

WHEN A STATUTE HAS BEEN OFFICIALLY INTERPRETED BY THE BODY CHARGED WITH ITS EXECUTION, AND THEREAFTER THE ACT IS AMENDED, AND THE AMENDMENTS OF CONGRESS DO NOT IN ANY RESPECT CHANGE THE PARTICULARS SO INTERPRETED, THE COURTS WILL ASSUME THAT CONGRESS HAS APPROVED AND ADOPTED SUCH INTERPRETATION IRRESPECTIVE OF WHAT THE COURTS MIGHT HAVE ORIGINALLY DETERMINED TO BE THE CORRECT INTERPRETATION.

United States v. *Mooney*, 116 U. S., 104, 106.

Kepner v. *U. S.*, 195 U. S., 100 (124).

The Abbottsford, 98 U. S., 444.

Diaz v. *U. S.*, 223 U. S., 442 (454).

Standard Oil v. *U. S.*, 221 U. S., 1 (59).

N. Y., N. H. & H. R. R. Co. v. *Interstate Commerce Commission*, 200 U. S., 361 (401-2).

Copper Queen Mining Co. v. *Arizona Board*, 206 U. S., 474, 479.

United States v. *G. Falk & Brother*, 204 U. S., 143, 152.

United States v. *Hermanos y Compania*, 209 U. S., 337.

7.

THE CHICAGO JUNCTION RAILWAYS AND UNION STOCK YARDS COMPANY, OTHERWISE KNOWN AS THE "INVESTMENT COMPANY," IS NOT SUBJECT TO THE PROVISIONS OF SECTION 1 OF THE ACT TO REGULATE CARRIERS, BECAUSE

(a) It is not a common carrier.

(b) It is not engaged in the transportation of property or passengers from any point in one state to any point, either within or without the State.

8.

IRRESPECTIVE OF WHAT THE DECISION OF THE COURT MAY BE EITHER AS TO THE "STOCK YARD COMPANY," OR AS TO "THE JUNCTION COMPANY," THE MERE FACT THAT "THE INVESTMENT COMPANY" OWNS SHARES OF STOCK OF THE TWO COMPANIES DOES NOT DESTROY ITS IDENTITY OR MERGE IT INTO THE IDENTITY OF EITHER OF THE OTHER TWO COMPANIES.

U. S. ex rel. v. *Delaware & Hudson Co.*, 213 U. S., 366.

Coal Belt Electric Ry. Co. v. *Peabody Coal Co.*, 230 Ill., 164.

9.

THE UNITED STATES COMMERCE COURT NOT ONLY HAD JURISDICTION TO DETERMINE WHETHER THE ASSAILED CONTRACT WAS OR WAS NOT UNLAWFUL, BUT IT WAS ITS DUTY TO DETERMINE SUCH QUESTION.

Elkins Act, Sec. 2.

Elkins Act, Sec. 3.

10.

WHEN THE JURISDICTION OF A COURT OF EQUITY IS INVOKED IN GOOD FAITH, THE COURT WILL DECIDE ALL OF THE QUESTIONS PRESENTED BY THE CASE, EVEN THOUGH IT DECIDES THE JURISDICTIONAL QUESTION AGAINST THE PERSON INVOKING THE JURISDICTION.

Siler v. *L. & N. R. R. Co.*, 213 U. S., 175.

Michigan R. R. Tax cases, 138 Fed., 223.

Burton v. *U. S.*, 196 U. S., 283.

Williamson v. *U. S.*, 207 U. S., 425.

Hopkins v. *Grimshaw*, 165 U. S., 342.

Ober v. *Gallagher*, 93 U. S., 199.

U. S. v. *Union Pac. Ry. Co.*, 160 U. S., 1.

Current Law, Vol. 2, pp. 623, 624.

11.

THE ASSAILED CONTRACT IS NOT ILLEGAL.

It is made for the purpose of maintaining a desirable customer at the live stock market at the Stock Yards.

(a) It is not made by a common carrier or on behalf of a common carrier with a shipper.

(b) It is not based upon the transportation of any property whatsoever.

(c) It has nothing to do with the rates charged or paid for the transportation of any property.

Willoughby v. *Chicago Junction Railways and Union Stock Yards Co.*, 50 N. J. Eq., 656; 25 Atl., 277.

12.

THE INTERSTATE COMMERCE ACT SHOULD BE INTERPRETED IN PARI MATERIA WITH THE ANTI-TRUST ACT. IT SHOULD BE HELD THAT A CONTRACT, NOT MADE BY A COMMON CARRIER SUBJECT TO THE ACT TO REGULATE COMMERCE, IS NOT PROHIBITED BY LAW IF ITS MAIN PURPOSE AND CHIEF EFFECT IS TO PROMOTE THE LAWFUL BUSINESS OF THE PARTIES MAKING IT.

Hopkins v. *United States*, 171 U. S., 578.

Bigelow v. *Calumet & Hecla Mining Co.*, 167 Fed., 704 (712), and cases there cited.

Standard Oil Co. v. *U. S.*, 221 U. S., 1.

American Tobacco Co. v. *U. S.*, 221 U. S.,

ARGUMENT FOR THE APPELLANT, CHICAGO JUNCTION RAILWAY COMPANY.

I.

THE CHICAGO JUNCTION RAILWAY COMPANY HAS NOT SUBMITTED ITSELF TO THE PROVISIONS OF THE ACT TO REGULATE COMMERCE.

There can be no doubt but that it is possible for a railroad company to so arrange its business as not to subject itself to the provisions of the Act to Regulate Commerce.

This was clearly held by this court in *Cincinnati, New Orleans & Texas Pacific Railway* v. *Interstate Commerce Commission*, 162 U. S., 184, where the court said, page 191:

> "It may be true that * * * a corporation of the State of Georgia, and whose entire road is within that State, may not be legally compelled to submit itself to the provisions of the Act of Congress, *even when carrying between points in Georgia freight that has been brought from another state.*"

The Junction Company contends that its method of doing business has brought it squarely within the possibility outlined by that decision.

Whether or not it is correct in this position depends, not upon broad generalizations and unwarranted assumptions, but upon a careful study and scrutiny of the Act, of the activities in which the company is engaged and of the judicial decisions in which the questions presented in this case have heretofore been considered.

As originally passed in 1887 the first section of

the Act to Regulate Commerce reads (for the purposes of this case) as follows:

> "That the provisions of this Act shall apply to any common carrier or carriers engaged in the transportation of passengers or property, wholly by railroad or partly by railroad and partly by water, when both are used, under a common control, management or arrangement for a continuous carriage or shipment, etc."

In the Act as amended in 1906 the words:

> "or partly by railroad and partly by water when both are used, under a common control, management or arrangement for a continuous carriage or shipment"

were placed in a parenthesis.

Prior to the amendment, the words: "a common control, management or arrangement," were supposed to modify and refer to the phrase; "wholly by railroad."

As the Act is now constructed, the phrase: "under a common control, management or arrangement," does not modify the words "wholly by railroad."

So far as the Junction Company is concerned, (and for the purposes of this case) the Act reads as follows:

> "The provisions of this Act shall apply to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad from one state to another."

Let us now consider, with still further patience and detail, what it is that the Junction Company does, that justifies the assertion of the government that it is within the terms of the Act.

For a more convenient discussion of the case, the

Junction Company's business may be grouped into two great classes, to-wit:

(a) Its passive functions; and

(b) Its active functions.

1. As to its passive functions:

(a) It permits foreign carriers with their own motive power to haul over its rails through trains, for which it receives from such carriers a trackage charge per car irrespective of the origin, destination, contents of the car, or the revenue derived from the haul.

(b) It permits foreign carriers with their own motive power to haul livestock from points outside of Illinois destined to commission men doing business at or near the Yards, and it receives from the trunk line carrier for such use of such tracks a trackage charge per car irrespective of the origin, the contents of the car, or the revenue derived from the haul.

2. As to its active functions.

(a) It switches from points in Illinois on its own rails to other points in Illinois on its own rails, either outgoing or incoming dead freight, for a fixed sum per car irrespective of the origin, or the destination, or the commodity or of the revenue derived therefrom. This switching charge is paid to it by the Trunk Line carrier who has engaged to make the haul, and the Junction Company does not know the shipper or consignee in the transaction.

(Page 16, *ante*.)

(b) It frequently weighs cars, for which it is paid

by the persons desiring the service, whether they be carriers, shippers or consignees. (Page 22, *ante.*)

(c) It distributes what is called "L. C. L. dead freight." (Page 18, *ante.*)

(d) It switches, with its own motive power, cars loaded with horses. (Page 20, *ante.*)

(e) Occasionally, as the agent of the trunk line carrier which contracts to make the haul, it receives prepaid L. C. L. freight destined to points beyond the State of Illinois. In such instances it issues a receipt in the name of the trunk line carrier as its agent. (Page 18, *ante.*)

What is it in these various passive and active functions that justifies the conclusion that the Junction Company is a common carrier engaged in the transportation of property from one state or territory to another?

Surely, its passive functions do not permit of such a conclusion.

The mere letting of tracks to be used by an interstate carrier does not make the lessor an interstate carrier. The lessee may be a common carrier, but the lessor does not by reason thereof have impressed upon it the functions of a common carrier.

It does not perform any of the functions of the carrier.

As was said by this court in *Gracie* v. *Palmer*, 8 Wheat., 605 (632, 633):

> "The carrier may hire his vehicle or his team or his servant for the purposes of transportation, or he may undertake to employ them

himself in the act of transporting the goods of another. *It is in the latter case, only, that he assumes the liabilities and acquires the rights of a common carrier.*"

We may, therefore, safely conclude that so far as the so-called "*passive functions*" of the Junction Company are concerned, it is not a common carrier engaged in interstate commerce between the several states.

As to its active functions as distinguished from its passive functions, the Junction Company is nothing more than a tug. It takes the car in Illinois loaded with freight and hauls it to another point in Illinois, in the same way that a tug takes a loaded steamer and hauls it to its berth. The "Trunk Line carrier" contracts with or (in the language of the Act) "engages" to make the through haul for the shipper. The Trunk Line carrier then employs the Junction Company to make the switch and pays the Junction Company for the local service.

The Junction Company does not itself engage to transport freight originating outside of Illinois to any point in Illinois, or *vice versa*. What it engages to do is to haul loaded or empty cars delivered to it for that purpose for a fixed sum over its own rails. Such services by tugs do not constitute tugs as common carriers engaged in interstate commerce. Likewise, such services do not make of the Junction Company a common carrier engaged in interstate commerce.

In the case of *The J. P. Donaldson*, 167 U. S., 599, the court said (603):

"A general ship carrying goods for hire, whether employed in internal, in coasting or in

foreign commerce, is a common carrier; and the ship and her owners, in the absence of a valid agreement to the contrary, are liable to the owners of the goods carried as insurers against all losses, excepting only such irresistible causes as the act of God and public enemies. * * * *But a tug and her owners are subject to no such liability to the owners of the vessels towed, or of the cargoes on board of them.* * * *Unlike the case of common carriers,* damage sustained by the tow does not ordinarily raise the presumption that the tug has been in fault."

Authorities under Point 5 supra.

4. Decisions on the subject.

We have been arguing this case up to the present time as if it were a case of first impression. But as a matter of fact the courts up to the time of the decision by the Commerce Court in this case had been unanimous in holding that a corporation rendering services, such as those rendered by the Junction Company, was not a common carrier engaged in interstate commerce within the meaning of Sections 1 and 6 of the Act to Regulate Commerce.

The question first came before the Circuit Court of the 6th Circuit in 1889, two years after the passage of the Act. In that case *the Kentucky and Indiana Bridge Company*, a corporation created by the laws of the two states, owned and operated a bridge across the Ohio river. It was engaged in the following business:

(a) It actually carried interstate passengers across the Ohio river. In this respect it was doing a business which the Junction Company is not doing and has never done.

(b) It permitted interstate carriers to use its rails for the purpose of hauling with the motive power of such interstate carriers freight going from one state to another. For this service it was paid by the interstate carriers a fixed sum per car. As to this, it was performing the identical service which the Junction Company performs except that the bridge and rails of the bridge actually ran from one state to another.

(c) It switched cars wholly in the City of Louisville from points on its own rails to other points on its own rails, for which it received a fixed sum per car irrespective of the origin, destination or commodity contained in the car. In this respect it was engaged in performing one of the activities in which the Junction Company is engaged.

(d) It also solicited freight as the agent for the trunk line carriers under an arrangement with the trunk line carriers that if it obtained such freight the trunk line carriers would furnish cars to haul the same, and would pay to the Bridge Company the regular transfer sum per car.

Claiming that it was a common carrier engaged in interstate commerce of freight because of the services performed by it in Subdivisions "b," "c," and "d," it filed its petition in the United States Circuit Court and sought an injunction restraining the Louisville and Nashville Railroad Company from violating an order previously entered by the Commission, and enjoining upon it the duty of exchanging traffic with the Bridge Company as a carrier.

Kentucky & Indiana Bridge Co. v. *L. & N. R. Co.*, 37 Fed., 567.

Judge Jackson held that with respect to the activities mentioned in Subdivision "b" *supra*, the railway *companies transporting the goods were the common carriers, and not the Bridge Company which in fact owned the rails.*

The court held because of the fact that the Bridge Company leased its tracks to interstate carriers it could not as an interstate carrier invoke the provisions of the Act to Regulate Commerce to compel the railroad companies to transact business with or through it.

This holding of the court directly applies to and supports our position with respect to the legal conclusion flowing from the "passive functions" of the Junction Company.

Judge Jackson said (617):

> "Again it is perfectly clear that the petitioner cannot be properly regarded as a common carrier of the interstate freight transported over its bridge by the Ohio & Mississippi Railway Company, for the obvious reason that said bridge and approaches thereto to and from the yard and depot of the Ohio & Mississippi Railway Company at Hardin and Bank streets, in the City of Louisville, under the terms of the contract of September 29, 1886, between petitioner and said railway company, and under the provision of Section 1 of the Act to Regulate Commerce, constitute a part and portion of the Ohio & Mississippi Railway Company's lines, over which said railway performs its own transportation service. The provision of section 1, referred to, provides that "the term 'railroads,' as used in this act, shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any corporation operating a railroad, whether

> owned or operated under a contract, agreement, or lease; and the term 'transportation' shall include all instrumentalities of shipment or carriage.' Having, by contract with the petitioner, not only acquired the right to use said bridge and approaches, but secured for its engines, cars and trains a preference over all other railroads in such use, down to its southern terminus in the City of Louisville, and being in the actual use thereof under said contract, during the period covered by the present controversy, the Ohio & Mississippi Railway Company must, for the time being, be regarded as the owner or operator of said bridge and approaches, under the above provision of law, as to all freights transported by said company; and the through traffic which it carries over said bridge to its yard and depot in Louisville is in no sense either handled or moved by petitioner as a common carrier. In thus making the bridge and approaches a part or portion of the line of the railroad which uses or operates it under contract, there is a clear implication that the Act to Regulate Commerce did not intend to include such bridges as independent carriers, or 'railroads' coming within the purview of the law."

The same case is interesting as applied to the active functions of the Junction Company. The complaint was made by the Bridge Company that it was a common carrier because it switched the loaded freight cars at so much per car, but upon this matter Judge Jackson said (p. 617):

Proceeding to a discussion of this question, Judge Jackson said (p. 618):

> "The service performed was wholly within the limits of Louisville. The charge for that service was not made for the transportation of the goods contained in the car, but simply for

switching the car itself. Upon what principle is petitioner to be held or regarded as a common carrier, either of this car or of its contents? It was transferred under the obligation of its contract with the Ohio & Mississippi Railway Company to perform the service for one dollar. It was under no public duty to do such switching for any common carrier. It could not be required, aside from its agreement, to perform such service; and in performing the same it assumed none of the responsibilities of a common carrier, but only those of a switchman moving the vehicle in which the Ohio & Mississippi Railway was transporting its traffic. In respect to cars or traffic thus handled, petitioner can only be regarded as a switchman or transfer company. In the performance of such service it is no more a common carrier of interstate commerce or traffic, within the provisions of the law, than a city transfer company which checks a passenger's baggage at the hotel where it is received, and carries it, for an agreed compensation, to the station of the railroad over which it is to be transported into another state. The Act to Regulate Commerce does not extend to such agencies, or embrace such transfer companies, nor can they invoke the provisions of said act in their behalf, or in behalf of those whom they thus serve."

Next, taking up the significance of the fact that the Bridge Company acted as agent for the railroads in soliciting freight and in moving such freight in the cars of the railroads from the yards or freight station to the lines of the railroads, Judge Jackson said (p. 619):

> "It is equally certain that petitioner is not a common carrier of that class of interstate freight which it solicits for railroads, either under express or implied agreement, and for which such roads furnished it with cars, for the transfer

> of which over its bridge petitioner charged and collected bridge-tolls only. The law does not require respondent or any other railroad company to keep up such an arrangement with petitioner as to continue to supply it with cars in order to obtain such traffic, thus making petitioner its soliciting or collecting agent in order to protect its interest in securing tolls for its bridge."

Judge Jackson's summary is entirely applicable to the case at bar, and is as follows (p. 615):

> "* * * That petitioner is not, in law or in fact, a common carrier of property or freights, within the true meaning of section 1 of the Act to Regulate Commerce, and that in respect to freight which it offers or seeks to have interchanged with respondent at said Seventh and Magnolia connection it is only a transfer company or agency engaged in performing a switching service, for which it demands and receives from the party for whom such service is rendered, not traffic rates on the freight transported or transferred, but simply a switching charge for the shifting of cars, loaded or empty, from one line or connection to another."

The United States Commerce Court in attempting to distinguish the Bridge Company case called attention to the fact that under its charter the Bridge Company was not incorporated as a common carrier.

There is, however, no merit in that attempted distinction.

Judge Jackson clearly pointed out that it was the activities of the Bridge Company which would determine whether it was or was not a common carrier. He pointed out what we have already said, *supra*, to-wit:

That the Bridge Company *was a common carrier with respect to interstate passengers,* but the Bridge Company in the case before him was not claiming any relief in court with respect to its interstate passenger business and, of course, it is conceded in the case at bar that the Junction Company does not haul any passengers whatsoever, and does not with respect to any of its activities pass over *or contract to pass over* or across the state line.

Judge Jackson gave as an illustration certain activities connected with interstate commerce which he pointed out were not within the meaning of the Act, and did not bring persons engaged therein within the provisions of Section 1 or 6. One of these illustrations was the business of transfer companies in large cities.

Later this court, in *Pennsylvania* v. *Knight*, 192 U. S., 28, had the question whether or not such transfer companies were engaged in interstate commerce before it for decision, and reached the same conclusion as Judge Jackson.

The Bridge Company case has in fact been cited with approval by this court on other points many times.

It will be observed that in the bridge case *the Bridge Company endeavored to get the court to decree that it was a common carrier engaged in interstate commerce, but the court held against the Bridge Company.*

The next case involving substantially the same state of facts is the case of *Interstate Commerce Commission* v. *B. Z. & C. Ry. Co.*, 77 Fed., 942. In

this case the Interstate Commerce Commission filed its petition to require the defendant railroad company to file its tariffs as required by Section 6 of the Act to Regulate Commerce. The facts with respect to the operations of the defendant company are stated in the opinion as follows (p. 942):

> "The contention is that the company is not subject to the Interstate Commerce Act. Its line extends from Zanesville to Bellaire. It appears from the testimony of the receiver of the road and its auditor that, although a common carrier of freight, including freight marked and destined to points beyond its terminus, and in many cases to points beyond the state lines of Ohio, it never issues a bill of lading to any point beyond its own lines. Upon the bill of lading the marks upon the freight, the name of the consignee, and the destination, appear, but the bill of lading itself is always limitel to the line of the company's road. It also appears that its charges upon freight destined for points beyond its own terminus are paid as advance charges in many instances by the railroad company which takes the freight to its final destination.
>
> Further, it appears that the company receives no freight under through bills of lading; that is to say, if freight comes from another carrier destined to a point on its own line, it invariably issues its own bill of lading, and refuses to receive such freight upon any through bill issued by another company, although it pays advance charges when necessary, and collects them from the consignee.
>
> * * * * *
>
> My opinion, therefore, is that the defendant company is not within the purview of the interstate commerce act, and cannot be compelled to make the report called for. I have no doubt that Congress would have the power to amend the

act so as to require this and other companies occupying like relations to file reports, inasmuch as they all carry freight destined for points beyond the state in which the road is located. But the act is not so framed as to include the defendant company, and, while it is a proper act of courtesy for the defendant company to furnish annual copies of its report to the state commissioner of railroads and telegraphs, it cannot be forced to make such reports. The provision of the supplemental act is to be strictly construed, for the reason that section 6 enacts that the failure or refusal to make report shall operate as a forfeiture in each case in a sum of not less than $1,000 nor more than $5,000, to be recovered by the attorney general of the United States in the name and for the use and benefit of the United States. The act is therefore penal in its nature. The defendant is not liable for the costs."

The next case before the courts involving the same question is the case of the *United States ex rel. Interstate Commerce Commission* v. *C. K. & S. R. Co.*, 81 Fed., 783. In this case the United States filed a petition for mandamus to compel the defendant company to file an annual report with the Interstate Commerce Commission under the provisions of the Interstate Commerce Act. The opinion of the court is as follows:

"In this case I am of the opinion that the question is not so wide as it seems to be assumed or contended in the briefs and argument for the Commission; that is to say, it is not whether a railway carrier operating a line wholly in a single state, which 'hauls traffic in process of transportation to or from another state,' is subject to the power of Congress to regulate commerce, but is whether by the interstate commerce act it is, by that test alone, made subject to its regulations. The

question here, therefore, must be determined by the provisions of that act. It appears from the answer and amended answer, which are taken by the parties as showing the facts of the case, that both the termini of the defendant's railway are within the State of Michigan, that it transports freight, whether shipped from its line for destinations out of the state or from abroad to stations on its own line, upon local bills of lading under a special contract of carriage limited to its own line. It does not do such business upon through rates, which it divides with other carriers, or assume any obligation to or for them in respect of such carriage; and the delivery which it makes to other carriers, and its reception from them of freight, is not substantially different from a delivery to or reception from any consignee or consignor. If it is possible for a domestic railroad company, located and doing business wholly within a state, to so limit its business as not to be embraced by the act as one engaged in intestate commerce, it would seem as though it were done in this instance. Without going into a discussion of the general subject, it appears to me that the case is covered by what was said by the Supreme Court of the United States in *Cincinnati, N. O. & T. P. R. Co.* v. *Interstate Commerce Commission*, 162 U. S., 184, 16 Sup. Ct., 700, and by the decision of Judge Sage in *Interstate Commerce Commission* v. *Bellaire, Z. & C. Ry. Co.*, 77 Fed., 942. The result is that the defendant is not subject to the requirement of the commission to make report to it of its business under section 20 of the interstate commerce act, and that the motion for a mandamus to compel it to do so must be denied."

So far as we are advised, these are the only three cases in which the identical question presented for decision here has come before the courts. From them it appears that the Circuit Courts have been unanimous in holding that a carrier engaged in the activ-

ities in which the Junction Company is engaged, is not a common carrier engaged in interstate commerce within the meaning of that phrase as used in Section 1 of the Act to Regulate Commerce.

The first of these cases was decided two years after the Interstate Commerce Act was passed. The second and third cases were each decided ten years after the Act was passed.

Since the rendition of these three decisions, the Interstate Commerce Act has been amended many times*

But in no one of these cases did Congress amend the Act with respect to the questions determined in the three decisions.

In other words, Congress acquiesced in the interpretation placed by the courts upon the meaning of the first section as originally drafted.

It is a rule of great force, in the interpretation of statutes, *that after an act of congress has been authoritatively construed by a court and is amended or re-enacted* after such judicial construction *without affecting in any way the provisions so construed, the* courts will assume thereafter that congress has approved and adopted the judicial construction placed upon its language.

Authorities Point 6 of the brief.

The appellant, the Junction Company, invokes this rule of statutory interpretation in this case and insists that under it there is no escape from the conclusion that the Junction Company is not engaged in

*The Interstate Commerce Act was amended on March 2, 1899, Feb. 10, 1901, Feb. 8, 1895, June 29, 1906, April 13, 1908, Feb. 25, 1909 and June 18, 1910.

interstate commerce within the meaning of Section 1 of the Act to Regulate Commerce.

5. Decisions under the safety appliance act.

The government, in its argument before the United States Commerce Court, relied upon the reasoning of some of the lower courts in construing what is known as the "Safety Appliance Act."

But it will not do to say that the reasoning of the courts in cases arising under the "Safety Appliance Act" is applicable to the question presented here. The slightest reflection serves to distinguish the Safety Appliance Act and the Interstate Commerce Act.

The Interstate Commerce Act begins:

> "The provisions of this Act shall apply * * * to any common carrier * * * engaged in the transportation of passengers or property wholly by railroad from one state or territory to another."

The provisions of the Safety Appliance Act are very much broader than are the provisions of the Act to Regulate Commerce. In the Employers' Liability cases, 207 U. S., 503, it was held that the Safety Appliance Act should be interpreted as if it read as follows:

> "No common carrier shall haul a car carrying interstate commerce under any circumstances which is not equipped as hereinafter provided."

Judge Sanborn for the Circuit Court of Appeals, Eighth Circuit, pointed out the difference between these two acts of Congress:

> "It does not follow from the facts that the interstate commerce act was first passed, and

that it regulates commerce among the states, and declares that its provisions shall apply to the members of a certain class of carriers engaged therein, that the Sherman Anti-Trust Act, the safety appliance acts, and other subsequent acts regulating commerce apply to the members of that class only, in the face of the positive declarations of the latter acts that they shall govern other parties and other branches of commerce. The subject of the first act was the contracts, the rates of transportation of articles of interstate commerce; the subject of the safety appliance acts was the construction of the vehicles, the cars, and engines which carry that commerce. The evils the former was passed to remedy were discrimination and favoritism in contracts and rates of carriage; the evils the latter was enacted to diminish were injuries to the employes of carriers by the use of dangerous cars and engines. The remedy for the mischiefs which induced the passage of the former act was equality of contracts and rates of transportation; the remedy for the evils at which the latter act was leveled was the equipment of cars and engines with automatic couplers. Neither in their subjects, in the mischiefs they were enacted to remove, in the remedies required, nor in the remedies provided, do these acts relate to similar matters, and the rule that the words or terms of acts in *pari materia* should have similar interpretations ought not to govern their constructions."

The Safety Appliance Act prohibits any carrier, *whether engaged in interstate commerce or not*, from hauling interstate commerce in any car not equipped as required by Congress. The Safety Appliance Act deals with the instrumentalities in which interstate commerce is carried.

The Interstate Commerce Act is a regulation of a corporation engaged in interstate commerce. It is obvious that a person not engaged in interstate com-

merce might be prohibited by law from moving equipment containing interstate commerce not equipped as provided by the Safety Appliance Act.

Indeed, the phrase "trains, locomotives, tenders, cars and similar vehicles used on any railroad engaged in interstate commerce" as found in the Act effective September 1, 1903, has been construed as if there were a comma after the word "railroad."

The phrase "Engaged in interstate commerce" has been held to modify not the word "railroad," but the preceding words, to-wit, "trains, locomotives, tenders, cars and similar vehicles."

See United States v. *Erie*, 166 Fed., 353, 355.

United States v. *Chicago & Northwestern Railway Co.*, 157 Fed., 616, 618.

The appellant, the Junction Company, insists that if it be possible for a common carrier to so arrange its business as not to bring itself within the provisions and obligations of Section 1 of the Act to Regulate Commerce, that it has done so. This court has held that a common carrier may not be compelled to subject itself to the provisions of the Act except by its own consent.

Cincinnati, New Orleans & Texas Pacific Ry. v. *Interstate Commerce Commission*, *supra*.

The Junction Company, therefore, respectfully insists that the decree entered against it on this point should be reversed with directions to the United States Commerce Court to dismiss the case against it for want of equity.

ARGUMENT FOR THE APPELLEES, THE UNION STOCK YARD AND TRANSIT COMPANY OF CHICAGO, OTHERWISE KNOWN AS "THE STOCK YARD COMPANY," AND THE CHICAGO JUNCTION RAILWAYS AND THE UNION STOCK YARDS COMPANY, OTHERWISE KNOWN AS "THE INVESTMENT COMPANY."

I.

THE UNION STOCK YARD & TRANSIT COMPANY OF CHICAGO IS NOT A COMMON CARRIER ENGAGED IN INTERSTATE COMMERCE AND IS NOT SUBJECT TO THE PROVISIONS OF SECTION 1 OR OF SECTION 6 OF THE ACT TO REGULATE COMMERCE.

1. *Its Charter.*

We have searched in vain for any facts connected with the activities of the Stock Yard Company which would furnish the foundation for the conclusion that this Company is a common carrier within the meaning of Section 1 of the Act.

From whatever point of view it may be considered no such conclusion seems possible. Under its charter the company was authorized:

> "To locate, construct and maintain all necessary yards and enclosures, buildings, structures and railway lines and tracks * * * for the reception and safe keeping * * * delivery and transfer of cattle and live stock * * * and for the accommodation of the business of a general union stock yard for cattle and live stock."

True it is the Company was directed by Section 3 of the charter to construct a railway so as to connect the stock yards with the *tracks of all the railroads which terminate in Chicago.*

But, no duty was imposed upon it to operate these tracks. No power was granted to the company to conduct a general railroad business. On the contrary by Section 11 it was prohibited from maintaining or operating a railroad for the conveyance of passengers or freight in the City of Chicago. On the tracks it did construct, however, it was given the power:

> "To transport between said railroads (referring to the trunk lines) to the cattle yards * * * live stock and persons accompanying the same to and from said yards, and to transport and *allow* to be transported between the railroads freight and property of every kind as well as stock and cattle."

It is very clear that the Legislature did not intend to create it as a general railroad business or to impose upon it the duty of entering into the business of a common carrier. The entire purpose of the Act was to provide for the creation of a stock yards with railroad tracks and other facilities necessary to make the same accessible to all the railroads entering the City of Chicago. The Company's railroad operations were strictly confined to a specific territory proximate to the City of Chicago, and it was expressly prohibited from making any contract, or having any agreement with any railroad company to receive cattle, hogs or live stock to the exclusion of any other person or corporation having a stock yards in proximity to said city.

Charter Section 11—*Rec.* 26.

Any effort on the part of the railroad company to engage in the general business of an interstate rail-

road or *to conduct railroad operations beyond the State of Illinois, or beyond the space fixed in its charter would have been ultra vires of the corporation.*

Not only under the charter was the duty not imposed upon the Company to operate its railroad company, but the express power was conferred upon it to *allow* the tracks to be used by others. In other words it could lease, or otherwise by contract provide for their use and operation.

This brief resume of its charter leads but to one conclusion, to wit, that the company was not incorporated for the purpose of becoming a common carrier; that the duty was not imposed upon it of becoming a common carrier; that it had no power under its charter to engage in interstate commerce, and that the sole purpose for the construction of its tracks was to furnish facilities by which the trunk lines entering into the city could obtain railroad access to the proposed Stock Yard Company.

2. *The activities of the Stock Yard Company.*

At a time long prior to the date when interstate commerce litigation occupied its present conspicuous position in the public eye and before the courts, the Stock Yard Company disposed of its tracks.

Under the pertinent allegations of the bill and the disclosures contained in the answer it is quite clear that the Stock Yard Company is not engaged now and was not on the date of the filing of the bill engaged in any transportation whatsoever. It does

not hold itself out as being a common carrier in any respect whatsoever. Its business is as follows:

(a) It unloads live stock shipped to commission merchants for which it receives a fixed compensation per car.

(b) When live stock is sold on the hoof to be shipped from Chicago it loads such live stock into outgoing cars, for which it is paid a fixed sum per car.

(c) It carries on the business of feeding and watering stock. For this it is paid either by some carrier or some owner.

(d) If any partitions are needed in cattle cars which happen to be at the yards the Stock Yard Company will install them if the owner wishes it done and will pay therefor.

In none of these activities does it perform the service of carriage. In none of them does it undertake to perform such service or agree with any owner or shipper to have such service performed by any other person, firm or corporation.

The bill alleges and the answer alleges that *interstate carriers* make arrangements for the carriage and delivery of their freight with the shippers and consignees *through agents employed by the interstate carriers located at or near the* stock yards. With these arrangements the Stock Yard Company has no part and no interest.

Up to the present time the authorities without exception have held a company engaged in the business which this appellee in the case at bar is now transacting is not a common carrier in any sense of

the word. It was so held in *Cotting* v. *Kansas City Stock Yards Company*, 82 Fed., 839 (842)*.

In *Union Stock Yards Company of Omaha* v. *United States*, 169 Fed., 404, while considering whether or not the Union Stock Yards Company of Omaha was liable for a violation of the Federal Safety Appliance Act, the Circuit Court of Appeals through Mr. Justice Van Devanter held that such activities as those in which the Stock Yard Company is engaged did not make it a common carrier.

See, also:

Hopkins v. *United States*, 171 U. S., 578.
United States v. *E. C. Knight Company*, 156 U. S., 1.

The whole argument of the Government on this branch of the case amounts to this:

> "If any person, firm or corporation is employed by an interstate carrier to do any local service for such interstate carrier in connection with the business of any interstate carrier, then such other person, firm or corporation becomes *ipso facto* a common carrier subject to the provisions of Section 1 of the Act to Regulate Commerce."

If this proposition be true then it follows that if a farmer is employed by a railroad to unload cattle for rest and water and to reload them that he, therefore, becomes subject to the provisions of the Act to Regulate Commerce, and that the duty is imposed upon him to file tariffs and make reports in accordance with the provisions of the Act.

It is respectfully submitted that a reasonable in-

*This case was later reversed on another ground.

terpretation of the Act to Regulate Commerce leads to no such absurdity.

"To state the proposition is to refute it."

As a matter of fact the Interstate Commerce Commission Act determined years ago that the appellee in the case at bar, which it now claims *is a* common carrier, *was not* a common carrier.

> *Cattle Raisers Association* v. *Fort Worth & D. C. R. Co.*, 7 I. C. C., 513 (536-538).

This case came before the Commission in 1897, prior to the time when the Stock Yard Company had divested itself of its tracks. At that time the Stock Yard Company was then engaged in it's general stock yards and hotel business, and also was operating the railroad tracks constructed under its charter.

Referring to the activities of the Stock Yard Company other than its operation of the railroad tracks, the Commission said:

> "The Union Stock Yards & Transit Company alleges that, in respect of the matters involved in this proceeding, it is not a common carrier subject to the jurisdiction of the Act to Regulate Commerce and moves to be dismissed.
>
> That Company is a corporation under the laws of the State of Illinois. * * * In accordance with this (its) act of incorporation the company has constructed its stock yards and its lines of railway connecting the tracks of the various defendants with those of the stock yards. It may by virtue of its corporate power either lease these connecting tracks or furnish the motive power and conduct the transportation of various kinds of

freight over these tracks to and from the stock yards. * * * In respect to live stock, however, it imposes a trackage charge, and the defendants in all cases by their own motive power and with their own crews transport the cars to and from the stock yards. Apparently at the stock yards the work of unloading is done by the Stock Yard & Transit Company.

Upon this state of facts it is difficult to see how the Union Stock Yards & Transit Company can be held subject to the Act in this proceeding. The Act provides that it shall apply 'to any common carrier or carriers engaged in the transportation of passengers or property.' *The Union Stock Yards & Transit Company is not in any sense of that word a carrier as to this freight.* It publishes no tariff; it issues no way bill; it has nothing to do with the transportation of this property. *It possesses no incident and discharges no function of a common carrier in respect to this traffic.*"

See, also:

Kentucky & Indiana Bridge Co. v. Louisville & N. R. Co., supra.

This decision of the Commission was rendered in 1898. Since that time as has been shown, *supra*, the Interstate Commerce Act has been amended five times, but no effort has been made on the part of Congress to modify the law or to change the language of the statute so as to enlarge it.

This being the decision of the Commission with respect to the identical company now before the court, the language of this court in *N. Y., New Haven & H. R. R. Co. v. Interstate Commerce Commission*, 200 U. S., 361, is peculiarly apt (p. 401):

"Now, without at all intimating that as an

original question we would concur in the view expressed in the case last cited, that to have applied the act to regulate commerce, under proper rules and regulations for the segregation of the business of producing, selling and transporting as presented in the Haddock and Coxe cases, would have been confiscatory, and without reviewing the rulings made by the Interstate Commerce Commission in those cases and adhered to by that body during the many years which have followed those decisions, we *concede that the interpretation given by the Commission in those cases to the act to regulate commerce is now binding, and as restricted to the precise conditions which were passed on in the cases* referred to, must be applied to all *strictly identical cases in the future, at least until Congress has legislated on the subject.* We make this concession, because we think we are constrained to so do, in consequence of the familiar rule that a *construction made by the body charged with the enforcement of a statute, which construction has long obtained in practical execution, and has been impliedly sanctioned by the re-enactment of the statute, without alteration in the particulars construed, when not plainly erroneous, must be treated as read into the statute.*"

See also:

Authorities under point 7 of our brief.

Neither will it do to say that if the Stock Yard Company is not a common carrier the purpose of the Act to Regulate Commerce can thereby be defeated. The mere fact that a sub-contractor of an interstate carrier employed by it to do a local service for such carrier is not thereby subject to the provisions of the Act to Regulate Commerce, does not for a moment limit or curtail the power of the

Commission over the interstate carrier itself. If the interstate carrier should make a separate charge for the local service and it is unreasonable the Commission can control it as it has done in many cases.

If the interstate carrier should make a lump charge which would include both the transportation and the local service, and the same is too large or unreasonably high, the Commission can control it.

But the appellee respectfully submits that there is no authority for the proposition that one who does a local service for an interstate carrier thereby becomes himself an interstate carrier subject to the provisions of the Act to Regulate Commerce.

3. *As to the Stock Yard Company's Ownership of railroad tracks:*

Upon the hearing in the United States Commerce Court, however, it was urged that because of the fact that the Stock Yard Company had originally constructed some railroad track and was still the owner, though not the operator of the tracks and because of the further fact that over such tracks interstate commerce was now moved, that therefore, the Stock Yard Company was a common carrier engaged in interstate commerce within the meaning of Paragraph 1.

The appellee submits that the mere fact of the ownership of property which is used by others for railroad purposes, or for the purpose of common carrier, does not make of the owner himself a common carrier.

A common carrier has been defined by Mr. Justice Clifford in *The Propeller Niagara* v. *Cordes, et al.*, 21 How., 7, at page 22,

> "As one who undertakes for hire to transport the goods of those who may choose to employ him from place to place. He is in general bound to take the goods of all who offer."

As Justice Johnson said in 8 Wheat., 605, 632-3:

> "The carrier may hire his vehicle, or his team, or his servant, for the purpose of transportation, or he may undertake to employ them himself in the act of transporting goods of another. *It is in the latter case only, that he assumes the liabilities, and acquires the rights of a common carrier.*"

The decision of Judge Jackson in *Kentucky & Indiana Bridge Co.* case, *supra*, is also quite apt as applied to the contentions made by the Stock Yard Company.

But why enlarge upon this situation?

At common law the mere ownership of railroad tracks did not make the owner thereof a common carrier.

The Act to Regulate Commerce does not declare that the owner of railroad tracks is thereby a common carrier.

The charter of the appellee did not impose the duty upon the appellee, the Stock Yard Company, of becoming a common carrier.

The activities in which it is engaged are not the activities of a common carrier.

It does not contract to perform the obligations of a common carrier.

It does not come within the definition of the phrase "common carrier" as defined by any reputable authority.

Words and Phrases Judicially Defined, Vol. 2, page 1313, *seq.*

It, therefore, respectfully submits that it is not a common carrier within the meaning of Section 1 of the Act to Regulate Commerce, and is not subject to its provisions or to the provision of Section 6.

II.

THE CHICAGO JUNCTION RAILWAYS AND UNION STOCK YARDS COMPANY, OTHERWISE KNOWN AS THE "INVESTMENT COMPANY" IS NOT A COMMON CARRIER WITHIN THE MEANING OF SECTION 1 OF THE ACT TO REGULATE COMMERCE.

It is very difficult to imagine upon what theory the Government insists that the Investment Company is within the jurisdiction of Section 1, and therefore of Section 6 of the Act. The only connection between the Investment Company and the Stock Yard Company, and the Junction Company is that the Investment Company owns all of the stock of the Junction Company and a large part of the stock of the Stock Yard Company.

If the court should hold that neither the Junction Company or the Stock Yard Company is a common carrier within the meaning of Section 1 of the Act to Regulate Commerce then it necessarily follows

that there is no case on this point against the Investment Company.

If on the other hand it be held that either or both the Junction Company and the Stock Yard Company are common carriers within the meaning of Section 1 of the Act, it still does not follow that the Investment Company has any of the attributes or characteristics of a common carrier.

It is not claimed in the bill of complaint that its affairs are so intermingled with the affairs of the operating companies that it is in fact an operating company, or that it as a holding company cannot be distinguished from an operating company.

It is not shown that it interferes in any way, shape or manner with the operations of either of the companies in which it owns securities to any greater extent than any stockholder may be said to interfere by the mere casting of his vote.

It does not own the property of either of the companies.

It has not destroyed their identity.

It is simply a stockholder, nothing more and nothing less.

It does not hold itself out as a common carrier. It has no relation or connection legally or otherwise with the transportation of freight, or with contracts of shipment, or with the operation of railroad tracks, or the stock yard pens.

If the Government seriously argues that the Investment Company is a common carrier, the answer to its contention has been so conclusively stated by

the court itself that nothing further need be said than to cite the case:

Authorities under Point 9 of our Brief.

III.

THE QUESTION AS TO WHETHER OR NOT THE STOCK YARD COMPANY SHOULD BE REQUIRED TO FILE REPORTS UNDER SECTION 20 OF THE ACT IS NOT BEFORE THE COURT.

It is unnecessary to consider in this case whether or not the Union Stock Yard and Transit Company of Chicago is the owner of a railroad engaged in interstate commerce within the meaning of that phrase as used in Section 20 of the Act to Regulate Commerce, because it does not appear from the bill of complaint that the Commission has ever required, called upon, or asked it to make a report. The duty is not imposed even upon a carrier by statute to make such report in the absence of an order from the Commission.

We, therefore, do not propose to discuss this question at this time except to say that it is the position of the Stock Yard Company that Section 20 does not require reports from the mere owner of railroad tracks which happen to be used by some other person, firm or corporation in interstate commerce. Section 20 as we interpret it requires reports only from owners engaged in interstate commerce.

A railroad in and of itself cannot be engaged in interstate commerce. Railroads as such are not engaged in interstate commerce, or in any kind of commerce. Railroads may be used or operated by

persons, firms or corporations which are engaged in interstate commerce.

The phrase as used in Section 20 "engaged in interstate commerce" unquestionably modifies the word "owner," and not the word "railroad." If it should be construed as modifying the word "railroad" it would be an absurdity and a violation of the plain meaning of the English language.

IV.

THE CONTRACT BETWEEN THE STOCK YARD COMPANY AS PRINCIPAL AND THE INVESTMENT COMPANY AS GUARANTOR AND THE PFAELZERS IS NOT ILLEGAL AND THE CONSUMMATION OF THE SAME SHOULD NOT BE RESTRAINED.

(1) THE JURISDICTIONAL QUESTION.

At the threshold of this branch of the case, however, we are met by the decision of the United States Commerce Court to the effect that it had no jurisdiction to determine the questions submitted.

We will, therefore, consider this question of jurisdiction before proceeding to discuss the legality of the contract.

The Government by its bill of complaint asserted that the United States Commerce Court did have the power to determine the legality of the proposed contract, and asked to have it restrained.

The appellees did not question the jurisdiction of the court in the premises.

It is not assailed by any pleading on file. The lack of jurisdiction was a question raised by the judges of the Commerce Court themselves.

Indeed, in view of the fact that a question had been raised as to the legality of its proposed contract, the Stock Yard Company was so anxious to have it determined one way or the other, that when the court refused to decide the question upon the ground of lack of jurisdiction, the Stock Yard Company filed a petition for a rehearing.

In this court neither of the appellees question the jurisdiction. On the contrary, they insist that the Commerce Court and this court both have jurisdiction to determine the legality of the proposed contract. This follows for the following reasons:

It is provided by Section 2 of the Elkins Act, as follows:

> "That in any proceeding for the enforcement of the provisions of the statutes relating to interstate commerce * * * it shall be lawful to include as parties, *in addition to the carrier*, all persons interested or affected by the rate, regulation, or practice under consideration, and inquiries, investigations, orders, and decrees may be made with reference to and against *such additional parties* in the same manner, and to the same extent, as are or shall be authorized by law with respect to carriers."

Under Section 2 of the Act if the Government in good faith files a bill against one alleged to be a common carrier, other corporations and persons may be joined as parties defendant, and that when once joined the court has the authority to decide every question raised in the case.

The proceeding is analogous to those proceedings wherein litigation is begun in a Fed-

eral Court involving other questions besides the question of jurisdiction. In such cases even though the court decides the jurisdictional question against the party invoking the jurisdiction, nevertheless if the jurisdiction is sought in good faith, the court will decide all of the other questions upon their merits.

Authorities under Point 10 *of our Brief.*

In this case the appellees have not assailed, and do not assail in any respect the good faith of the Government in charging that the Stock Yard Company is a common carrier.

Again under Section 3 of the Elkins Act it is provided:

> "That whenever the Interstate Commerce Commission shall have reasonable ground for belief that any common carrier is engaged in the carriage of passengers or freight traffic * * * at less than the published rates on file or *is committing any discriminations* forbidden by law * * * a petition may be presented alleging such facts to the Circuit Court of the United States sitting in equity. * * * Whereupon it shall be the duty of the court summarily to inquire into the circumstances * * * and without formal pleadings * * * to make *such other persons or corporations* parties thereto as the court may deem necessary * * * and said court shall enforce an observance of the published tariffs or direct and *require a discontinuance of such discrimination by proper orders * * * which * * * may be enforceable as well against the parties interested in the traffic as against the carrier.* * * *"*

Here again the appellees insist that when a suit is filed in equity by the Commission charging a cer-

tain specific defendant as being a common carrier and alleging that it is indulging in illegal practices the court may require other persons to be made party defendants summarily, and then restrain such other persons from continuing their illegal acts.

Indeed, it is a cardinal principle of equity jurisprudence that when a court of equity has jurisdiction of a suit brought in good faith for any purpose, it will decide all of the questions involved.

Authorities under Point 11 *of our Brief.*

For these reasons the appellees not only do not object to the jurisdiction of the Commerce Court and this court to decide the debated question, but they join with the Government in asserting that the Commerce Court erred in refusing to exercise jurisdiction. They submit the case now being here, that this court should itself decide, and pass upon the legality of the proposed contract, and remand the case to the Commerce Court with directions to enter such decree with respect thereto as this court shall upon the merits determine.

(2) THE LEGALITY OF THE PROPOSED CONTRACT:

What is this contract which is assailed by the Federal Government as being unlawful?

There can be but one answer. It is a contribution made by the Stock Yard Company towards the erection of a plant at its yards. It is made because the entire business of the company is dependent upon the existence and operation of packing houses in the immediate neighborhood of its property. These

plants afford a certainty of buyers of live stock at the yards.

There can be no reasonable doubt but that the purpose of the contract is legitimate, and exactly what the contract discloses on its face.

It needs no argument to prove that a great market for live stock cannot be permanently maintained without buyers being located in its immediate vicinity, otherwise there would be no staple demand and no certain market.

The contract is not remotely or incidentally connected with transportation, or freight or the rates paid therefor.

With respect to Pfaelzer & Sons, the beneficiaries of the contribution, the contract does not call for, and does not impose upon them the duty of making a single shipment, either as consignor or consignee over any railroad in the United States. For generations payments of this character have been made in this country. They are clearly within the charter powers of corporations.*

In 1890 the Investment Company itself paid $750,-

*Ellerman v. *Chicago Junction Railways, &c., Co.*, 49 N. J. Eq., 217; *Willoughby* v. *Chicago Junction Railways, &c. Co.*, 50 N. J. Eq., 656; *Richelieu Hotel Co.* v. *Mil. Encampment Co.*, 140 Ill., 248, 263-4; *B. S. Green Co.* v. *Blodgett*, 159 Ill., 169, 174-6; *Central Lumber Co.* v. *Kelter*, 201 Ill., 503, 505; *Northern Pac. R. Co.* v. *City of Spokane*, 56 Fed., 915, 917, s. c., 64 Fed., 506, 509, and cases cited; *McGeorge* v. *Big Stone Gap Imp. Co.*, 57 Fed., 262; *Vandall* v. *S. S. F. Dock Co.*, 40 Cal., 83; *People* v. *Eel River, etc., R. R. Co.*, 98 Cal., 665; *Temple St. Cable Ry.* v. *Hellman*, 103 Cal., 634; *Texas & St. L. R. R. Co.* v. *Robards*, 60 Tex., 545; *Whetstone* v. *Ottawa University*, 13 Kansas, 320; *Town Co.* v. *Russell*, 46 Kansas, 382; *Hasson et al.* v. *Venango Bridge Co.*, 1 Pa. Dist. Rep., 521; *Leslie* v. *Lorillard et al.*, 110 N. Y., 519; *Louisville & Nashville R. R. Co.* v. *Literary Society of St. Rose, &c.*, 91 Kentucky, 395.

000, and guaranteed both as to principal and interest bonds of the par value of $2,000,000 for Swift & Company, Armour & Company and Morris & Company, packers doing business at the yards. These large packing establishments were at that time about to leave the yards, and construct new establishments elsewhere. As the result of the contracts they covenanted not to remove their packing establishments from the yards, but to maintain and operate them there for a fixed period of years with an average daily kill which was fixed in the contract. In other words the contracts were identical in tenor and effect with the contract in controversy here.

This was 3 years after the passage of the Interstate Commerce Act.

Section 2 of that Act is identical today with what it was in 1890. This contract between the Investent Company and the larger packers at the yards was immediately assailed upon the ground that it was *ultra vires*, but the court held that it was legal.

> *Ellerman* v. *Chicago Junction Railways & Union Stock Yards Company*, 41 N. J. Equity, 217 (23 Atl., 87).

Later the same contract was assailed by a minority stockholder upon the ground that it violated the provisions of the Illinois Anti-Rebate Act, the Interstate Commerce Act, and the Sherman Anti-Trust Act.

While we appreciate that the decision of a New Jersey court would not as to such a question be binding upon this court, nevertheless it is persuasive. The court said:

"* * * Nor can I see how the agreement of the New Jersey Company *with the Associate Packers,* customers of the Chicago Company, although providing for an annual payment to them, can be held to provide for *a rebate or discrimination* in violation *of the Illinois statute.* But if it is admitted that the New Jersey Company stands for the Chicago Company; *that the latter is a railroad* corporation under the statutes of Illinois, and, as such, is subject to its provisions, and owes a public duty; and that, as the performance of the contract *is to be made in Illinois, it is* subject to the laws of that state,—wherein does the *agreement provide for an unlawful discrimination or rebate?* * * * Whether discrimination can be made lawfully or not, if not unjust, and the above questions considered in those cases, I do not stop to examine, because I do not detect in this case that the agreement of the New Jersey Company is open to such charge. It is obvious that the agreement does *not in terms make any provision looking to such* a purpose. The bills admit this. * * * But it is said, while the contract makes no provision in terms for unequal charges, and the Chicago Company does not intend to discriminate in that way, the whole scheme is a device to evade the statute, and that the statute provides not only that all such discriminating rates, charges, collections, or receipts, when made directly, but also when made by means of any rebate, drawback, or other shift or evasion, shall be deemed and taken against such railroad corporation as prima facie evidence of the unjust discrimination prohibited by the terms of the act. *But what prohibition of the act is sought to be evaded by the agreement?* So far as the Chicago company, as a corporation owning a railroad, is concerned, it must be those provisions *of the act aimed at different charges for depot charges, or for the transportation of cars*

over its tracks to different persons, or for long or short hauls. In view of the operations of the company as set out in its answer and the evidence, these are the only provisions of the act which apply.

There being no provision *for direct preference,* in what *does the alleged discrimination* consist, or how is it created? It is remarkable, as before suggested, that no two of counsel agree as to just how discrimination or rebate is provided for."

Coming to the further contention that the assailed contracts violated the Interstate Commerce Act, the court said:

"What has been said with reference to the question of freight in considering the matter in connection with the Illinois statute applies with equal force to this contention, and establishes that it is without merit."

Donations of the character of the one assailed here are frequently made by cities, or by improvement associations or land companies to industries for the purpose of obtaining the location of manufacturing establishments at or near the land. As a usual thing sites are selected near the tracks of railroad companies, but it has never been claimed that such a donation is a violation of either Section 2 of the Interstate Commerce Act or Section 3 of the Elkins Act.

Indeed, it requires a vivid imagination to evolve a theory upon which this contract between the Stock Yard Company and the Pfaelzers can be called illegal.

Section 2 of the Interstate Commerce Act is ex-

pressly limited to payments made by common carriers. The section begins:

> "If any common carrier subject to the provisions of this act shall directly, or indirectly, etc."

It is very clear from the reading of the provisions of Section 3 of the Elkins Act that that act also is limited to a prohibition of devices by which common carriers engaged in interstate commerce shall transport for shippers property for less than the published tariff rates. Section 3 reads as follows:

> "The wilful failure upon the part of any carrier subject to the Act to file and publish tariffs or rates * * * shall be a misdemeanor, and it shall be unlawful for any person or corporation to offer * * * or receive any rebate, concession or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to the Act to Regulate Commerce * * * whereby any such property shall be by any device whatever transported at a less rate than that filed in the tariffs published and filed by such carrier. * * * Any person or corporation whether carrier or shipper who shall knowingly offer, grant, or give * * * such rebates * * * shall be deemed guilty of a misdemeanor."

These provisions of the Act, in the ordinary meaning of the English language taken in connection with the context really mean,

> "That carriers and shippers may not either directly or indirectly give or receive any concession from the published rates whereby the property of the shipper shall be transported for a less rate than that named in the tariff of the carrier."

The Government in the argument in the Commerce Court seized upon the phrase,

> "And it shall be unlawful for any person or corporation."

It segregated these words from the context and then argued that a corporation not a common carrier would be guilty of paying a rebate if out of its private funds a contribution was made to a shipper which shipped freight over a railroad. The Government was forced to this position because if the Stock Yard Company is not a common carrier there is no other theory upon which the legality of the proposed contract can be logically disputed.

To bolster up this unique argument the Government relied in the Commerce Court upon a decision by his Honor, Judge Landis, in *Interstate Commerce Commission* v. *Reichmann*, 145 Fed., 235. The Interstate Commerce Commission in an investigation which it was conducting called to the stand an officer of a private car company owning some 9,000 cars. When the railroad companies used these private cars they paid to the owner of the cars as car mileage or rental therefor a certain sum per mile. The employe of the car company was asked this question.

> "What part of the mileage or from whatever source have you given up to shippers during the last six months."

The witness refused to answer. The Commission filed a mandamus proceeding to compel the witness to answer. In the opinion the court stated the following facts:

> "The car company has no direct or open re-

lations with the intending shipper. It does not undertake to supply him with cars. This is done by the carrier, and when the shipper is furnished cars belonging to the Street Company it gets no other or better transportation service than when his cattle go forward in cars of the carrier company. Nominally, at least, the car Company's only relation with respect to freight to be shipped is with the carrier, and its only interest in the transaction is that the freight may go forward in its cars; and this because when the car stands idle it produces no revenue for its owner, and when it is in motion it is earning mileage."

The case proceeded upon the theory that if the witness had answered the question he would have admitted that the Street Company had paid to shippers a bonus or reward for the purpose of influencing shippers to demand its cars from the railroad companies.

Judge Landis held that the witness should answer the question, and in his opinion further held that the owner of a private car which was rented by a railroad company could not pay any part of the mileage to a shipper for any purpose whatsoever; that such a transaction was forbidden by Section 3 of the Elkins Act.

This brief statement of the *Reichmann* case is sufficient to distinguish it from the cases at bar.

Irrespective of whether the *Reichmann* case is or is not good law it has no authority here. In the *Reichmann* case a payment was being made to shippers by the owners of the cars which had a direct relation to the movement of the freight in the cars and to the cost thereof. It was paid by the owner of the car to influence the shipper to use the car.

The contract in the case at bar differs so radically from the arrangement in the Reichmann case that the Reichmann case might well be the law and still not be an authority against the legality of the contract involved here.

But the appellees go further and respectfully submit that the Reichmann case is not an authority in support of the proposition for which it is cited by the Government. All that the court held in that case was that the witness should answer the questions propounded to him by the Interstate Commerce Commission.

The appellees submit that when the Elkins Act is fairly construed it will not be held to prohibit a person or corporation not a common carrier from contributing out of its private funds a bonus to a manufacturer, even though the same contribution if made by a common carrier might be held to be illegal.

As was said by this court in discussing the Anti-Trust Act in *Hopkins* v. *United States*, 171 U. S., 578:

> "There must be some direct and immediate effect upon interstate commerce in order to come within the Act."

So we say here that a contract does not violate the Act to Regulate Commerce merely because remotely it is of value to a manufacturer who may or may not also be a shipper over some railroad. If the main purpose and chief object of the contract is

to promote the lawful business, and to increase the lawful trade of the parties, it is not prohibited by law.

V.

CONCLUSION.

The importance of this case to the appellees, the Stock Yard Company and the Investment Company, cannot possibly be minimized:

The legality of its bonus contracts having been assailed, the future prosperity of the Stock Yard Company may fairly be said to be hanging in the balance.

The answer shows that the Stock Yard Company exists upon a competitive basis with other yards scattered throughout the United States.

If the Stock Yard Company is permitted to compete with its competitors because of the Interstate Commerce Act, it is not overstating the fact to say that the prosperity of the property as the largest livestock market in the world will be impaired to a degree which it is impossible to exaggerate.

To fail to decide this most important question would be equally unfortunate. The officers of the Stock Yard Company and of The Investment Company do not believe that the proposed contract is illegal, but—its legality is assailed by the Federal Government.

In other words they are confronted, if this question is not decided upon its merits, on the one hand with business incompetency, and on the other hand with a criminal prosecution.

No officer charged with the duty of wisely managing the affairs of his stockholders should be forced to choose between two such harsh alternatives.

The law should be so clear that anyone anxious to obey it may understand it, and we earnestly join with the Government in asking the court to determine this all important issue.

The appellees, the Stock Yard Company and the Investment Company, submit that the decree of the lower court to the effect that they and neither of them are common carriers should be affirmed; that this court should in this proceeding pass upon and determine the legality of the proposed contract, and as to that question should reverse the decree of the Commerce Court with directions that a decree be entered therein finding that the assailed contract is lawful and dismissing *the petition as to them and each of them not because of want of jurisdiction, but because of want of equity.*

Respectfully,

RALPH M. SHAW,
Solicitor for the Appellant and the Appellees.

FILED.
OCT 15 1912
JAMES H. McKENNEY,
CLERK

Supreme Court of the United States.

OCTOBER TERM, A. D. 1912.

THE UNITED STATES OF AMERICA UPON THE APPLICATION OF THE ATTORNEY GENERAL, AT THE REQUEST OF THE INTERSTATE COMMERCE COMMISSION, *Appellant,* vs. THE UNION STOCK YARD AND TRANSIT COMPANY OF CHICAGO, A CORPORATION; THE CHICAGO JUNCTION RAILWAY COMPANY, A CORPORATION; THE CHICAGO JUNCTION RAILWAYS AND UNION STOCK YARDS COMPANY, A CORPORATION; AND DAVID PFAELZER, ABE PFAELZER, AND JONAS PFAELZER, A COPARTNERSHIP DOING BUSINESS UNDER THE FIRM NAME OF LOUIS PFAELZER & SONS, *Appellees.*	621.
CHICAGO JUNCTION RAILWAY COMPANY, *Appellant,* vs. THE UNITED STATES OF AMERICA, *Appellee.*	622.

REPLY ARGUMENT FOR
APPELLANT, CHICAGO JUNCTION RAILWAY COMPANY,
and
APPELLEE, UNION STOCK YARDS AND TRANSIT COMPANY OF CHICAGO.

RALPH M. SHAW,
Solicitor for said Appellant and said Appellees.

GUNTHORP – WARREN PRINTING CO., CHICAGO

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1912.

THE UNITED STATES OF AMERICA UPON THE APPLICATION OF THE ATTORNEY GENERAL, AT THE REQUEST OF THE INTERSTATE COMMERCE COMMISSION, *Appellant,*	
vs.	
THE UNION STOCK YARD AND TRANSIT COMPANY OF CHICAGO, A CORPORATION; THE CHICAGO JUNCTION RAILWAY COMPANY, A CORPORATION; THE CHICAGO JUNCTION RAILWAYS AND UNION STOCK YARDS COMPANY, A CORPORATION; AND DAVID PFAELZER, ABE PFAELZER, AND JONAS PFAELZER, A COPARTNERSHIP DOING BUSINESS UNDER THE FIRM NAME OF LOUIS PFAELZER & SONS, *Appellees.*	621.
CHICAGO JUNCTION RAILWAY COMPANY, *Appellant,*	
vs.	622.
THE UNITED STATES OF AMERICA, *Appellee.*	

REPLY ARGUMENT.

In order that the issues in this case may be clearly defined, and that there may be no misunderstanding as to the position taken by the respective parties on the respective questions involved, the appellant, the "Junction Company," and the appellee, the Stock Yard Company herewith respectively submit the following suggestions, by way of a reply to the brief and argument filed by the Government in these cases.

I.

THE STATEMENT OF FACTS.

The statement of facts made by the Government differs somewhat from the statement made in the brief filed by the "Junction Company," the "Stock Yard Company" and the Investment Company, but it is only fair to say that a careful study of the facts as made in the briefs of each of the parties hereto, coupled with reference to the record will leave no one in doubt as to the exact facts touching the history, the organization and the activities of the companies involved in this litigation and of the questions which are presented for review here.

II.

THE GOVERNMENT'S POINTS AND AUTHORITIES.

(1) The Junction Company and the Stock Yard Company do not question the proposition enunciated by the Government to the effect that property is in interstate commerce from its delivery to the carrier for shipment into another state.

Coe v. *Erroll*, 116 U. S., and the *Daniel Ball* decide that point.

In the *Daniel Ball*, the court also held that a steamer engaged in navigating wholly in one state [redacted] the navigable waters of the United States, could be required to take out a license and have its boat inspected under the federal laws regulating the navigability of the navigable waters of the United

States. But the service rendered by the *Daniel Ball* with respect to interstate commerce was entirely different from the service rendered by appellant the Chicago Junction Railway Company. The facts in the case at bar, aside from the point decided, exclude that case from being an authority here.

However—the question as to the time when an article begins to move in interstate commerce is not one of the questions presented in these cases.

The only questions presented by these cases which are even remotely connected with the proposition discussed by the government are whether the Junction Company and the Stock Yard Company are common carriers "*engaged in interstate commerce*" within the meaning of the Interstate Commerce Act.

As to this, both the Junction Company and the Stock Yard Company respectfully insist that the trunk line carriers which undertake, or in the words of the statute "engage" to carry the goods for the shippers are the only ones who, in the words of the statute are "engaged in interstate commerce."

From this it follows that the farmer or any other person or corporation that furnishes the unloading dock for cattle in transit (though he furnishes a service or instrumentality which comes within the definition of "transportation" as that word is defined by the first section of the Act), is not subject to its provisions, nor to the jurisdiction of the Commission.

Indeed it may fairly be said that the Government is committed to the proposition that neither the

Stock Yard Company nor the Junction Company is a common carrier engaged in interstate commerce. In 1908 three indictments were brought in by the grand jury, at the instigation of the Government, against the St. Louis National Stock Yards, in the Eastern District of Illinois, known as numbers 520, 589 and 599. In each of these cases the Government insisted that the Stock Yards Company had violated the 28-hour law. The cases were tried upon a stipulated state of facts. In the opinion Judge Wright said:

> "The statute is that no railroad * * * common carrier other than by water * * * whose road forms any part of a line of road over which cattle, sheep, swine, * * * shall be conveyed from one state or territory * * * into or through another state or territory * * * shall confine the same in cars * * * for a longer period than 28 consecutive hours without unloading the same * * *.
>
> There are certain exceptions not necessary now to be alluded to * * * it being alleged that the St. Louis National Stock Yards violated this law. Of course the first question to determine, and that is the principal question that has been alleged here, is whether this organization known as the National Stock Yards is a railroad or a common carrier. Its very name imports to start with, that it is not either a railroad or a common carrier. And by looking into the stipulation which has been submitted, upon which this case is to be adjudged, it is very clear to my mind that it is neither a carrier nor a railroad within the meaning of the statute. It is true it has certain tracks, 33 and a fraction miles of railroad, but its business is to receive these shipments of live stock and to deliver and care for them, and to feed them and house them. That is all it does. * * * The fact that the railroad or carrier had violated the law prior

to that time is of no importance, so far as the stoppage of these jacks (being the cattle in transit) is concerned. It wouldn't do to say that because the carrier had violated the law, that therefore no one who had the appliances and facilities for feeding and watering, as contemplated by the statute, would dare to take them. That is the absurdity to which this argument finally leads.

So upon no view of this case does the Stock Yards fall within the meaning of this statute. It isn't its business to transport or carry * * * it only receives at the line of its confines—never goes off its own premises, and delivers the stock to those to whom it was consigned if they are located within its yards. Entertaining these views there can be but one finding, that would be, that the defendant is not guilty in these cases."

Later that judgment was affirmed by the Circuit Court of Appeals for the Seventh Circuit. The Government appealed to this court, but when the case came on for argument permitted the judgment of the District Court to be affirmed on stipulation.

U. S. of America v. *St. Louis National Stock Yards*, 223 U. S., 737.

(2) It may be true, as is urged by the Government, that cars are "the subject of commerce." It is true that cars may, at time, be articles moving in interstate commerce in the same way that any other commodity moving in interstate commerce is an article of commerce. But the Stock Yard Company is not engaged in moving cars in interstate commerce. It does not move them at all.

The same is true of the Junction Company.

So far as the Junction Company moves cars at

all, it does not move the cars "as freight." For the purposes of the service rendered by the Junction Company the car is not an article of commerce. It is a conveyor or holder in which articles of commerce are stored. The service rendered by the Junction Company in switching the cars containing interstate commerce does not, for the purposes of its case, detract from or add to the capacity in which the Junction Company acts. As was said by this court in *U. S.* v. *St. Louis Terminal Co.*, 224 U. S., 383 (401).

> "We are not unmindful of the essential difference between terminal systems proper, so described, and the railroad transportation companies. *The first are but instrumentalities which assist the latter in the transfer of traffic between the lines and in the collection and distribution of traffic.*"

As was said in *A., T. & S. F.* v. *U. S.*,

> "The company, in carrying the mails, was not hauling freight, nor was it acting as a common carrier with corresponding rights and liabilities. * * *"

So we say in this case, the company, in switching cars loaded with freight for other companies, is not acting as a common carrier engaged in interstate commerce—it is the servant of a common carrier so engaged.

(3) Again, it is stated by the Government that a "towboat may be engaged in interstate commerce."

The appellant, the Junction Company, does not deny that a towboat may be engaged in interstate commerce.

The proposition for which the Junction Company

contended in its original brief and now contends here, is, that a towboat *is not a common carrier.* Of course, a towboat can be engaged in interstate commerce, but as was pointed out in our original brief, before a person, firm or corporation may be subject to the Act, it must be *a common carrier engaged in interstate commerce.* A towboat is not a common carrier. *The Junction Company may be engaged in interstate commerce but the service which it renders with respect to that commerce does not make it a common carrier engaged in interstate commerce.* The record is silent in this case with respect to what, if any, service the Junction Company does in the matter of intra industry movements. The Junction Company does, however, in fact switch intra industry freight at the yards, but its intra industry switching has nothing whatsoever to do with the service which it renders with respect to articles in interstate commerce. As to such shipments, it is a towboat and *not a common carrier engaged in interstate commerce,* within the meaning of the Interstate Commerce Act.

(4) It is stated by the Government under the heading "Points and Authorities" that "The Junction Company was conceded to be a common carrier." If, by that, it is meant that the appellant ever conceded that the Junction Company was or is a common carrier engaged *in interstate commerce,* the appellant, the Junction Company, respectfully denies that any such concession has ever been made. Beyond that, for the purpose of this case, it is unnecessary to go.

(5) It may be true, as is stated by the Govern-

ment, that "courts have held stock yard companies to be common carriers engaged in interstate commerce," but—

Such a statement as applied to the facts in these cases is extremely fallacious and misleading.

The Stock Yard Company respectfully submits that no court has ever held that any stock yard company whose activities were limited to the activities in which the appellee in these cases is now engaged was engaged in interstate commerce. No court has ever made such a decision. As was pointed out in our original brief, the Interstate Commerce Commission has decided exactly to the contrary with respect to this identical appellee. *Cattle Raisers Association* v. *Fort Worth and D. C. R. Co.*, 7 I. C. C., 513 (536-538).

AS TO THE ALLEGED PARTNERSHIP.

(6) It is argued, however, by the Government that the Stock Yard Company and the Junction Company are in reality partners, and are but one system in the eyes of the law. Five cases are cited by the Government in support of this proposition. The appellee, the Stock Yard Company, respectfully submits that not one of them is an authority in point as applied to the facts in its case.

The first case cited by the appellees upon this point held directly to the contrary.

In *Union Stock Yards Company of Omaha* v. *U. S.*, 169 Fed., 404, the Circuit Court of the Eight Circuit, while considering whether or not the Union Stock Yards Company of Omaha was liable for a vio-

lation of the Federal Safety Appliance Act, used the following language (406):

> "It must be conceded that the stockyards company would not be a common carrier, nor the property used by it a railroad, if its operations were confined to maintaining the sheds or pens, to unloading shipments thereto, to loading shipments therefrom, and to feeding, watering, caring for, and otherwise handling livestock therein."

In *Meehan* v. *Valentine*, 145 U. S., 623 (the second case cited by the Government) the court held generally that one who lends a sum of money to a partnership under an agreement that he shall be paid interest thereon at all events, and shall also be paid one-tenth of the yearly profits of the partnership business if those profits exceed the sum lent, does *not* thereby become liable as a partner for the debts of the partnership. In reaching this decision the court said (624):

> "So an agreement that a lessor of a hotel shall receive a certain portion of the profits thereof by way of rent does not make him a partner with the lessee."

In *Southern Pacific Terminal Co.* v. *I. C. C.*, 217 U. S., 498 (the next case cited by the Government on this point), the methods by which the Galveston Wharf was used as a part of the Southern Pacific Railroad Company, an interstate railroad, established the fact that the wharf was a part of the railroad. Further,—the documents in the chain of title and, as well, the franchise for its use, contained an express stipulation that the wharf in question was to be used as the public and general terminal of a designated interstate carrier system. Upon an ex-

amination of all the facts the court held that (a) the grant in title of the wharf, (b) the franchise, and (c) more particularly the method by which the Galveston wharf was used, made the wharf and the tracks thereon a part of the system; that it was in fact the Southern Pacific Railroad Company, and in view of the identical ownership, management and control, was one with that system. In the case at bar we are dealing with an entirely different situation.

(a) There is no identity of ownership, management and control, as in the Galveston case.

(b) The Stock Yard Company does not pretend to exercise any control over the tracks now operated and managed by the Junction Company.

(c) The Stock Yard Company is not a carrier engaged in interstate commerce.

(d) It is not a part of an interstate system.

(e) The Stock Yard Company as a corporation exercises no control over the Junction Company as a corporation.

The only relationship whatever between the Stock Yard Company and the Junction Company is the fact that there is a common ownership in the Investment Company of the stocks of each, but the common owner is not (as was the case in the Southern Pacific Company) engaged in interstate commerce. It is not a system conducting an interstate commerce business. It is merely an investment company owning securities. A terminal wharf owned and operated identical in interest, control and management with an interstate railroad com-

pany presents a very different situation from a stock yard which is neither owned, operated nor controlled directly or indirectly by an interstate carrier, and which does not, of itself, interfere with the operation or management of any operating company.

The case of the *Northern Securities Company* v. *U. S.*, 193 U. S., 197 (the next case cited by the Government on this point), merely presented the question as to whether or not the ownership of the stock of two competing interstate railroads which had been merged into a common owner as the result of an agreement for an exchange of securities was or was not a violation of the so-called Sherman Anti-Trust Act. The fact that the Northern Pacific and the Great Northern Railway Company were interstate carriers was conceded in the case and the question as to whether or not the Northern Securities Company was subject to the jurisdiction of the Interstate Commerce Commission was not raised upon the records. How different from the questions presented here!

The case of *U. S.* v. *Milwaukee Refrigerator Transit Co.*, 145 Fed., 1007 (the next case cited by the Government on this point), presents questions likewise essentially different from any questions presented here. In that case it was held that a refrigerator company organized for the purpose of controlling the interstate transportation of a brewing company, having entered into a contract for commissions on such traffic with certain railroads, was a party interested in the traffic and was therefore subject to the provisions of the Act prohibiting the granting or receiving of rebates. It will be

noted that the refrigerator company was organized for the express purpose of controlling the traffic of the brewing company. The amounts received by the refrigerator company were based upon and measured by the volume of interstate shipments which the refrigerator company delivered to the carrier. The court held (see p. 1012) that under such circumstances the refrigerator company occupied the same relation to the traffic as if it were the owner, and could not therefore receive compensation for delivering it to the railroad company based upon the volume of the traffic delivered.

How different from the case at bar!

Here there is no sum to be paid by an interstate carrier, to a person owning or controlling traffic, measured by the volume of the traffic delivered.

On the contrary, no payment is required here from any interstate carrier to any person whatsoever. No contract is here made by which any shipper or person owning or controlling freight, contracts or agrees to deliver any freight in any volume whatsoever to any common carrier. Every essential fact which made the contract with the refrigerator company abhorrent to the law is wholly absent from the facts in the case at bar.

Furthermore, although the case is cited as an authority in support of the proposition that the Stock Yard Company and the Junction Company are partners, it is apparent to even the casual reader, that the Refrigerator Transit Company case has no bearing upon that proposition whatsoever.

The case of *Kendall* v. *Klapperthal Co.*, 52 Atl., 92

(being the last case cited by the Government on this point), involved a question not even remotely connected to the questions under consideration here.

Why pursue this question further, however? The argument of the Government on this point is answered completely by the decision of this court in *U. S. ex rel.* v. *Del. & Hud. Co.*, 213 U. S., 366, cited in our original brief.

AS TO THE ALLEGED REBATING.

(7) Finally it is claimed that the payment under the Pfaelzer contract is a rebate, and nine cases are cited in support of the proposition. These cases can be disposed of summarily.

The case of *Ill. Cent. R. R. Co.* v. *Reichmann*, 145 Fed., 235, has already been distinguished in our original brief (see pp. 83-84) and needs no further consideration.

The case of *U. S.* v. *Milwaukee Refrigerator Transit Co.*, 145 Fed., 1007, has been distinguished, *supra*.

In *Thomas* v. *U. S.*, 156 Fed., 897, the appellant, Thomas, was indicted for an alleged conspiracy to obtain a rebate from the Burlington R. R. Co. in favor of certain shippers in St. Louis. The charge was that Thomas was party to an arrangement by which he undertook to get commissions from an interstate carrier upon all freight routed by him over the rails of such carrier; he in turn arranged to pay to such shippers in Kansas City as would permit him to route their freight, a certain portion of the sum received by him from the railroad company as such commissions. In other words, Thomas undertook

to give a refund to every shipper over the line of the carrier of a certain amount based directly upon the freight received by the railroad company for making the carriage. To state the case is to distinguish it.

In the case of *C. & A.* v. *U. S.*, 156 Fed., 558, the Alton Company was charged with paying a rebate of a certain sum per car of freight shipped by the shipper out of its plant over the rails of the Alton Company. The Alton Company defended the case upon the ground that the payments made by it were for trackage rights over rails owned by the shipper. The company was found guilty and fined. On the appeal to this court four of the justices held that the transaction was lawful and four held that it was unlawful, and the case was affirmed without an opinion, by an equally divided court. Irrespective of which of the two views of the law was correct, it is again sufficient to say that the mere statement of the case distinguishes it from the case at bar.

In *U. S.* v. *D. L. & W. R. Co.*, 152 Fed., 209, there was substantially the same scheme as that involved in the case of *Thomas* v. *U. S.*, *supra.*

A., T. & S. F. v. *U. S.*, 170 Fed., 250, has not the remotest bearing upon the questions presented here. In that case a judgment of guilty against the Atchison Company was reversed by the Court of Appeals because the lower court had refused to permit the accused to show that the sums with which they were charged with rebating were in fact sums which they were rightfully entitled to receive from the carrier because of damage to freight in shipment.

In *Wight* v. *U. S.*, 167 U. S., 512, it was held that

a refund upon specific shipments made by a carrier from a published tariff rate, sufficient to absorb the cartage by a consignee in the City of Pittsburgh, was a rebate.

In *N. Y. N. H. & H. R. R.* v. *I. C. C.*, 200 U. S., 361, the court merely held that a common carrier engaged in interstate commerce had no right to contract to sell and transport in completion of the contract the commodity sold, when the price stipulated in the contract did not pay the cost of purchase, the cost of delivery and the published freight rates. See p. 391.

In *Armour Packing Co.* v. *U. S.*, 209 U. S., 56, held that where a carrier transported freight for a shipper at less than the published tariff rates there was a violation of the Elkins Act, notwithstanding the fact that a contract previously entered into by and between the carrier and the shipper provided for the lower rate.

This ends the cases cited by the Government upon this branch of the case.

It will be seen that in substantially each one of them there was a direct relationship between a published tariff rate on a shipment moving thereunder and a payment made either by the carrier or some intermediary to the shipper, based upon the freight transported.

Decisions in such cases do not afford any aid in determining the questions presented by this case.

If the court holds, as we believe it will, that the Stock Yard Company is not a common carrier, then we have presented here the following facts:

1. A payment by a corporation, not a common carrier, of a certain sum of money, to a manufacturing concern, for the purpose of increasing the business of the payor. It is not made a condition of the payment that the payees shall make any shipments over any common carrier at any time. The amount to be received by the payee is entirely independent of the question as to whether it ever does at any time, either as shipper consign, or as consignee receive, any shipments over any common carrier. The mere statement of such a situation should suffice to purge it of all illegality.

The Government, however, claims that it is illegal because, as the Government says, if the payee does locate its plant at the desired point, then it will necessarily follow as a result of the payee's business, that the volume of freight moving over an alleged interstate carrier will be increased, and that therefore the payment by the payor to the payee should be construed by the court as being a payment in diminution of unknown freight rates which the payee may never have to pay, and that therefore it is illegal and should be prohibited.

Surely it requires a far stretch of the imagination to create out of such a state of facts a crime.

Nevertheless, this is the position taken by the Government and urged seriously by the Interstate Commerce Commission and the Department of Justice. It is therefore imperative, not only to the appellee and to the Pfaelzers, but to the entire commercial world, that the question presented should be determined, in order that men

anxious to obey the law and ignorant as to the law's meaning, may not be prosecuted as criminals for the commission of acts that up to the present time have never been held to be illegal.

We earnestly urge the court, therefore, to decide this question upon its merits, and to hold that the law was not created for the purpose of prohibiting so legitimate a transaction.

Respectfully submitted,

RALPH M. SHAW,
Solicitor for Chicago Junction Railway Company, Appellant, and Union Stock Yard and Transit Company, Appellee.

OCT 10 1912
JAMES H. McKEN

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1912.

THE UNITED STATES OF AMERICA UPON THE APPLICATION OF THE ATTORNEY GENERAL, AT THE REQUEST OF THE INTERSTATE COMMERCE COMMISSION, *Appellant,* vs. THE UNION STOCK YARD AND TRANSIT COMPANY OF CHICAGO, A CORPORATION; THE CHICAGO JUNCTION RAILWAY COMPANY, A CORPORATION; THE CHICAGO JUNCTION RAILWAYS AND UNION STOCK YARDS COMPANY, A CORPORATION; AND DAVID PFAELZER, ABE PFAELZER, AND JONAS PFAELZER, A COPARTNERSHIP DOING BUSINESS UNDER THE FIRM NAME OF LOUIS PFAELZER & SONS, *Appellees.*	621.
CHICAGO JUNCTION RAILWAY COMPANY, *Appellant,* vs. THE UNITED STATES OF AMERICA, *Appellee.*	622.

BRIEF AND ARGUMENT FOR DAVID PFAELZER, ABE PFAELZER, JONAS L. PFAELZER AND LOUIS PFAELZER & SONS, A CORPORATION, APPELLEES.

WILLARD M. McEWEN,
Solicitor for Appellees.

JOSEPH WEISSENBACH,
Of Counsel.

GUNTHORP – WARREN PRINTING CO., CHICAGO

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1912.

THE UNITED STATES OF AMERICA UPON THE APPLICATION OF THE ATTORNEY GENERAL, AT THE REQUEST OF THE INTERSTATE COMMERCE COMMISSION, *Appellant,* vs. THE UNION STOCK YARD AND TRANSIT COMPANY OF CHICAGO, A CORPORATION; THE CHICAGO JUNCTION RAILWAY COMPANY, A CORPORATION; THE CHICAGO JUNCTION RAILWAYS AND UNION STOCK YARDS COMPANY, A CORPORATION; AND DAVID PFAELZER, ABE PFAELZER, AND JONAS PFAELZER, A COPARTNERSHIP DOING BUSINESS UNDER THE FIRM NAME OF LOUIS PFAELZER & SONS, *Appellees.*	621.
CHICAGO JUNCTION RAILWAY COMPANY, *Appellant,* vs. THE UNITED STATES OF AMERICA, *Appellee.*	622.

STATEMENT.

These cases are brought here by the respective appeals of the United States of America and the Chicago Junction Railway Company from a decree entered by the United States Commerce Court.

The United States complains of the decree below, in that it failed to find others than the Chicago Junction Railway Company as engaged in interstate commerce and that it failed to pass upon and adjudicate the contract by which the Pfaelzers were to receive a bonus of Fifty Thousand Dollars ($50,000.00) from the Union Stock Yard and Transit Company of Chicago, but denied jurisdiction.

The interest known as the Pfaelzer contract originally belonged to the several Pfaelzers as co-partners, which interest was acquired later by the corporation, Louis Pfaelzer & Sons, which was made a party in the court below.

The Pfaelzers have no interest in the issue between the Chicago Junction Railway Company and the United States, except as it might affect the question of jurisdiction, nor any interest as between the Government and the other corporations, except as those questions affect the contract in question and the jurisdiction of the court.

Pleadings and Facts.

As to the nature of the case, the pleadings and facts, these appellees adopt the statement of the same filed on behalf of the Union Stock Yard and Transit Company of Chicago, and especially the statement concerning the said contract, appearing on pages twenty-four (24) to thirty-one (31), inclusive, of said brief.

The Contention of the Appellees, the Pfaelzers.

The contract in question is a legal one, not forbidden by any law or rule of public policy.

Some confusion existed below as to what facts were before the court, but we contend that the equity practice as to submission on bill and answer must prevail.

The plaintiff below, by moving for a decree, in the matter admitted the truth of all the answers,

but necessarily took the position that there was enough affirmatively admitted, by every defendant, of the allegations of the petition to authorize a decree against all, and that what was not admitted by the answer stands denied, and not proved.

Whether the proposed contract for the payment of Fifty Thousand Dollars was illegal, is to be determined by whether it was an unlawful discrimination or advantage.

What such a payment is depends both upon, (1) its effect as to all concerned; (2) the intention of the parties as to application. In no event does it transgress the law.

BRIEF AND POINTS.

I.

THE MAKING OF DONATIONS TO ASSIST ENTERPRISES TO AID THE BUSINESS OF A CORPORATION IS A LEGITIMATE OBJECT OF CONTARCT AND IS NOT AGAINST PUBLIC POLICY.

(See cases, Mr. Shaw's brief, p. 78.)

I I.

DISCRIMINATION BACKED BY A SOUND REASON (AS DISTINGUISHED FROM MOTIVE) IN A MATTER WHERE AN INDIVIDUAL HAS NO RIGHT TO DEMAND THE PRIVILEGE AS A PUBLIC SERVICE UNDERTAKEN TO BE FURNISHED BY A CARRIER AS SUCH TO ALL ALIKE AND WHICH DEPRIVES HIM OF NOTHING WHICH HE IS ENTITLED TO, OR SUBJECTS HIM TO NO DISADVANTAGE IN THE PUBLIC SERVICE RENDERED TO HIM, IS NOT FORBIDDEN BY THE LAW.

Memphis Frt. Bureau v. *Ft. Smith, etc., R. Co.*, 13 I. C. C. Rep., 1.

Int. Com. Com. v. *L. & N. R. Co.*, 73 Fed., 409.

Central Yellow Pine Assn. v. *V. S. & P. Ry. Co.*, 10 I. C. C. Rep., 193.

U. S. v. *Wells-Fargo*, 161 Fed., 606.

Int. Com. Com. v. *Alabama, etc., Ry. Co.*, 74 Fed., 715.

Cole v. *Rowen*, 13 L. R. A., 848.

Donovan v. *Pa. Ry. Co.*, 199 U. S., 278; 50 L. Ed., 193.

Gamble v. *C. & N. W.*, 168 Fed., 164.

U. S. v. *Oregon R. & Nav. Co.*, 159 Fed., 982.

Central Stock Yds. Co. v. *L. & N. R. Co.*, 24 I. C. C., 339; 118 Fed., 113; 55 C. C. A., 63; 192 U. S., 568; 48 L. Ed., 560.

Hart v. *Choctaw Ok. & G. Ry.*, 118 Fed., 169.

Missouri P. R. Co. v. *Nebraska*, 164 U. S., 404.

N. P. Ry. v. *R. Com.*, 28 (N. S.), L. R. A., 1021.

I. C. C. v. *Alabama Mo. R. Co.*, 168 U. S., 144; 42 L. Ed., 414.

L. & N. R. Co. v. *Behlmer*, 175 U. S., 684; 44 L. Ed., 309.

III.

WHAT A DONATION IS DEPENDS BOTH UPON ITS (1) EFFECT AS TO ALL CONCERNED AND (2) THE INTENTION OF THE PARTIES AS TO APPLICATION. THESE ARE THE ELEMENTS OF THE DISCRIMINATION AND ARE QUESTIONS OF FACT TO BE PROVED BY THE PETITIONER.

I. C. C. v. *L. & N. R. Co.*, 73 Fed., 409.

I. C. C. v. *Alabama Midland R. Co.*, 168 U. S., 144, 170; 42 L. Ed., 414.

Root v. *L. I. R. Co.*, 114 N. Y., 300; 4 L. R. A., 33.

Texas, etc., v. *I. C. C.*, 162 U. S., 197; 40 L. Ed., 940.

I. C. C. v. *Baltimore R. Co.*, 43 Fed., 37; same affirmed 145 U. S.; 36 L. Ed., 699.

IV.

THE PRESUMPTION IS IN FAVOR OF FAIRNESS AND LEGALITY.

I. C. C. v. *C. G. W. R. Co.*, 209 U. S., 108; 52 L. Ed., 268.

The plaintiff by moving for a decree below not only admits the truth of all the answers, but must take the position that there is enough affirmatively admitted *by every defendant* of the allegations of the petition to authorize a decree against *all*, for he must abide the chancery rule of pleading that what is not admitted stands denied.

There is not enough admitted by the answers for this court to say that the defendants either jointly or severally are common carriers nor enough to say that the payment to the Pfaelzers is an undue preference or a rebate.

There is but one fact before the court on which petitioner must stand, as to the Pfaelzers, viz.: that the Stock Yards Company will pay $50,000 as an unlawful discrimination.

What such a payment is depends both upon its (1) effect as to all concerned and (2) the intention of the parties as to application. These are the elements of the discrimination and are questions of fact to be proved by the petitioner.

I. C. C. v. *L. & N. R. Co.*, 73 Fed., 409.

I. C. C. v. *Alabama Midland R. Co.*, 168 U. S., 144, 170; 42 L. Ed., 414.

Root v. *L. I. R. Co.*, 114 N. Y., 300; 4 L. R. A., 33.

Texas, etc., v. *I. C. C.*, 162 U. S., 197; 40 L. Ed., 940.

I. C. C. v. *Baltimore R. Co.*, 43 Fed., 37; same affirmed 145 U. S.; 36 L. Ed., 699.

The presumption is in favor of fairness and legality.

I. C. C. v. *C. G. W. R. Co.*, 209 U. S., 108; 52 L. Ed., 268.

In *I. C. C.* v. *Alabama Mid. R. Co.*, Mr. Justice Shiras, in delivering the opinion of the court, said:

> "As the third section of the act, which forbids the making or giving any undue or unreasonable preference or advantage to any particular person or locality, does not define what, under that section, shall constitute a preference or advantage to be undue or unreasonable, and as the fourth section, which forbids the charging or receiving greater compensation in the aggregate for the transportation of like kinds of property for a shorter than for a longer distance over the same line, under substantially similar circumstances and conditions, does not define or discribe in what the similarity or dissimilarity of circumstances and conditions shall consist, it cannot be doubted that whether, in particular instances, there has been an undue or unreasonable prejudice or preference, or whether the circumstances and conditions of the carriage have been substantially similar or otherwise, are questions of fact *depending on the matters proved in each case.* *Denaby Main Colliery Co.* v. *Manchester, etc., Railway Co.*, 3 Railway & Canal Traffic Cases, 426; *Phipps* v. *London & Northwestern Railway* (1892), 2 Q. B. D., 229; *Cincinnati, N. O. & Tex. Pac. Ry.* v. *Interstate C. C.*, 162 U. S., 184, 194; *Texas & Pac. Railway* v. *I. C. C.*, 162 U. S., 197, 235." (See also *Howell* v. *New York L. E. & W. R. Co.*, 2 I. C. C. Rep., 272, 298; *Phillips Co.* v. *Louisville & N. R. Co.*, 8 I. C. C. Rep., 93, 108; *Danville* v. *Southern R. Co.*, 8 I. C. C. Rep., 409, 427.)

The proof or an admitted allegation of an unlawful discrimination, by a carrier or anyone, is utterly wanting.

The Answers Rebut Discrimination.

On the contrary, it appears that the proposed donation is reasonable, harms no one, and is not made by a carrier.

Discrimination and Reasonableness.

The making of donations to assist enterprises is the legitimate subject of contract and is not against any public policy.

It is promotion practiced all over the country by individuals and municipalities.

Although a carrier may not offer discriminatory freight privileges, *it may properly offer lawful inducements to industries to locate on its line.*

Memphis Frt. Bureau v. *Ft. Smith, etc., R. Co.*, 13 I. C. C. Rep., 1.

Otherwise a new railroad would not get started for many years, although others who had used inducements, are already enjoying dividend paying traffic.

Questions of unjust discrimination or undue preference must be treated broadly and practically. The carrier's business is one which involves so many considerations, and the necessity for taking account of so many conditions and factors, that questions of this kind cannot be decided by any process of mere arithmetic or mathematical calculation, and do not

admit of any rigidly theoretical rules in their solution.

Int. Com. Com. v. *L. & N. R. Co.*, 73 Fed., 409.

And no court is warranted in saying that mere payment alone is unjust discrimination.

Custom is shown of similar payments by stock yard companies to assist packing companies whose presence is vital to maintaining a market. If a stock yards company, not a carrier, may offer inducements, then it has a distinct advantage over one who is a carrier. To deny the stock yards company the right to donate is to deny the right of self-preservation exercised by others similarly situated, about whose being carriers there is no question.

A custom long exercised, which, if excluded, would produce greater injustice than its continuance will control a question of alleged discrimination, as in the *Milling in Transit* cases.

Central Yellow Pine Ass'n. v. *V. S. & P. Ry. Co.*, 10 I. C. C. R., 193.

And many others with which the court is familiar.

The payment complained of does not *relate to services performed as a carrier*, as it must to fall within the law.

U. S. v. *Wells-Fargo*, 161 Fed., 606.

The discrimination is neither unjust or unreasonable, only unjust or unreasonable discrimination as a carrier is forbidden.

Int. Com. Com. v. *Alabama, etc., Ry. Co.*, 74 Fed., 715.

In this case the prevailing doctrine was thus stated:

> "We do not discuss the third and fourth contention of the counsel further than to say that, within the limits of the exercise of intelligent good faith in the conduct of their business and subject to the two leading propositions that their charges shall not be unjust or unreasonable and that they shall not unjustly discriminate so as to give undue preference or disadvantage to persons or traffic similarly circumstanced, the act to regulate commerce leaves common carriers, as they were at common law, free to make special rates looking to the increase of their business, to classify their traffic, to apportion and adjust their rates so as to meet the necessities of commerce and of their own situation and relation to it and generally to manage their important interests upon the same principles which are regarded as sound and adapted to other trades and pursuits."

Acts Which are not Discriminations.

A railroad company may give special privileges to a hackman for the transfer of passengers from its depot to other places, including the use of private grounds;

Cole v. *Rowen,* 13 L. R. A., 848;

Donovan v. *Pa. Ry. Co.,* 199 U. S., 278; 50 L. Ed., 193;

may require one shipper to pay in advance and no one else;

Gamble v. *C. & N. W.,* 168 Fed., 164;

may give warehouse site to one and refuse another;

U. S. v. *Oregon R. & Nav. Co.,* 159 Fed., 982;

may use one live stock depot and decline another;

Central Stock Yds. Co. v. *L. & N. R. Co.,*

24 I. C. C., 339; 118 Fed., 113; 55 C. C. A., 63; 192 U. S., 568; 48 L. Ed., 560;

may build spur track for one and not another;

Hart v. *Choctaw Ok. & G. Ry.*, 118 Fed., 169;

Missouri P. R. Co. v. *Nebraska*, 164 U. S., 404;

N. P. Ry. v. *R. Com.*, 28 (N. S.), L. R. A., 1021.

A legal reason for what would otherwise be forbidden is *competition.*

Competition among localities is firmly established as a justification for actual discrimination.

I. C. C. C. v. *Alabama Mo. R. Co.*, 168 U. S., 144; 42 L. Ed., 414.

L. & N. R. Co. v. *Behlmer*, 175 U. S., 648; 44 L. Ed., 309; and many interstate Commerce Commission decisions.

By the same reason, that an advantage is necessary to be given to prevent the destruction or impairment of competition, stock yards companies are fully justified in making donations.

We think the following is a fair statement from the cases:

Discrimination backed by a sound reason (as distinguished from motive) in a matter where an individual has no right to demand the privilege as a public service undertaken to be furnished by a carrier as such to all alike and which deprives him of nothing which he is entitled to, or subjects him to no disadvantage in the public service rendered to him, is not forbidden by the law.

To show the situation and practice regarding donations and the proposed payment of the $50,000 and its application we quote from the amendment to the answer of the Pfaelzers:

> "That at and long prior to the time of the making of said contract for the payment of $50,000, there were stock yards located in various cities of the West and Southwest, namely, at Chicago, Illinois; Milwaukee, Wisconsin; Sioux City, Iowa; Omaha, Nebraska; St. Joseph, Missouri; Kansas City, Missouri; St. Louis, Missouri; East St. Louis, Illinois; Fort Worth, Texas; Dallas, Texas; St. Paul, Minnesota; Denver, Colorado; Oklahoma City, Oklahoma, at which were located large packing and slaughtering plants, which consumed live stock and furnished a market for the same.
>
> That it has been customary with all of the respective owners of such stock yards, for the purpose of building up and retaining a market, to assist persons and corporations by ways of donations, land or money, or both, to locate packing and slaughtering and other plants, which not only benefited such stock yards owners, but also was of great value to the stock raisers of the contiguous district and equalized the handling of stock throughout the country, by furnishing various convenient places of slaughter and preparation for the market.
>
> That as an illustration of the extent to which this custom is followed these respondents aver that within the past year the owners of the yards at Oklahoma City paid to a large packer the sum of $750,000 to locate a slaughter house at such yards.
>
> As a further illustration respondents aver that several years ago the said Stock Yards Company at Chicago, gave to a packer land for a plant and $500,000 in cash. That this practice and custom has existed for many years and is the result of competition between and

among the several cities having stock yards industries.

That these respondents aver, on information and belief, at the time when it became necessary for these respondents to build a new plant or cease business, they could have obtained from the owners of the stock yards at Kansas City, $200,000 to locate at that place.

That the slaughtering business at Chicago is conducted by about twelve persons and corporations, of which six do about 95 per cent., and of the remaining 5 per cent., these respondents do about 1 per cent. of the total business.

That some one or more of the so-called 'big six' doing 95 per cent. of the business as aforesaid have plants at all of the places above named and by reason of their size and facilities and diverse locations ,are able to exercise a great control of the market in all places, and but for the competition of the smaller packers, like these respondents, would exercise an almost absolute control over prices, and a substantial monopoly.

That these respondents do not, nor does their successor, pay any freight to railroads whatever, except that in certain months of each year, they are usually unable to get a high enough grade of beef for their trade, in Chicago, and therefore buy in the Kansas City market in those months cattle by the carload, which they ship to Chicago and kill at their said plant, and occasionally purchase a few hogs, and sometimes lambs in the Louisville, Ky., market; that the freight paid for this service in the five years last past was for cattle $10,911.61, for lambs $3,099.05, for hogs $169.34, making a total of $14,180, or a yearly average of $2,836. That otherwise respondents substantially pay no freight.

That all coal, salt and supplies are furnished at a lump price by weight F. O. B. cars at the plant, and any freight paid therefor is by re-

spondent as agents of the seller and deducted from the lump sale price on settlement.

That in the past almost the entire product of the plant, excepting by-products, has been sold to the local city trade, and not handled by rail; that the freight on whatever shipments are made is paid by the consignee and not for or by these respondents or their successor.

That the establishing of the plant of these respondents at the yards takes up about 125 feet of sidetrack and there is much other property available for other plants on the sidetrack and switches of the said Stock Yards Company.

That said $50,000 is to be paid solely as an assistance to the erection of said new plant and enters into the capitalization thereof, and was and is purely a legitimate business transaction, promoting the interests of these respondents, the Stock Yards Company, the railroads, the stock raisers, the labor market and the retail butcher and consumer."

The benefit to the Pfaelzers is not as shippers, but as manufacturers. The answers show that the Pfaelzers pay substantially no freight, that in the last five years they have paid less than $15,000 where it has been necessary for them to go outside to get the necessary grade of cattle and lambs, and then to none of the other defendants. There might be contingencies where this would be unnecessary, and they would pay no freight at all. This shows that the Pfaelzers, as freight-payers, are of no benefit whatever to the Union Stock Yards, and the payment could not have been intended by them as a rebate or discrimination for freight. The few carloads for which they paid freight in a year would not be one-thousandth part of the freight paid for all the live stock handled at the stock yards,

and such an infinitesimal per cent could have no effect upon a competitor to put anyone to such a disadvantage in the packing business as to affect trade. The payment is just what it purports to be and what it is alleged to be in the answers, namely, an assistance to them in their business, to keep up the live stock market in Chicago, and promote competition.

If, then, the benefit or preference inures to the Pfaelzers as manufacturers and not as shippers, and it does not militate against any individual as a shipper or patron of the common carriers, it is nothing of which anyone can complain, least of all those who receive the great benefit—the public, through the Attorney General.

THE ESSENCE OF THE MATTER.

(1) Promotion of business at the stock yards, both of the Stock Yards Company and others, increasing competition assisting a market, giving employment, supplying the public, giving business to railroads and others, and necessity to continue the custom is a sound reason.

(2) No one has a right to demand this preference of a carrier. It deprives no one of anything as a shipper in his rights to equal service.

(3) No one feels the preference and no one can be located who is harmed or who is discriminated against.

(4) The Stock Yards Company is not acting as a carrier and is protecting its own interests as a matter of self-preservation against other yards ex-

isting or which may be created about whose business there may be no question of a right to donate. And this whether it be a carrier or not.

We submit, on the facts before the court the court cannot say that the payment is a discrimination, or by a carrier, or against anybody; but it can say on the answers that the payment is a reasonable act; just, in accordance with a custom, promotes competition and discriminates against no one as a shipper, and is not in the line of carrying by a carrier or service rendered, and should have been so decided.

Respectfully,

WILLARD M. MCEWEN,
Solicitor for the Pfaelzers.

JOSEPH WEISSENBACH,
Of Counsel.